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IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1975

No. 74-1054

JERRY MILTON CREWS and
DEBORAH LEIGH PARRISH,

Petitioners

vs.

STATE OF NORTH CAROLINA,
and RUFUS L. EDMINSTEN,
Attorney General of the State of
North Carolina.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

JERRY MILTON CREWS and
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vs.

STATE OF NORTH CAROLINA,
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Attorney General of the State of
North Carolina,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA;

TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

NOW COMES petitioners, Jerry Milton Crews and Deborah Leigh Parrish, by and through counsel, and pray this Honorable Court to issue writ of certiorari to review the judgment and order of the Supreme Court of North Carolina and in support hereof respectfully show unto the Court the following:

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Carolina is reported in 286 NC 41, 209 SE 2d 462 (1974). The opinion of the North Carolina Court of Appeals is reported in 22 NC App. 171, 205 SE 2d 765 (1974). The opinion of the North Carolina Supreme Court appears at Appendix A, infra, pp. a1. The opinion of the North Carolina Court of Appeals appears at Appendix B, infra, pp. b1.

JURISDICTION

The opinion of the Supreme Court of the State of North Carolina was entered on November 26, 1974. See Appendix A, P. a1, infra. This Petition for Certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3).

QUESTIONS PRESENTED

The defendants were indicted,tried and convicted of possession of amphetamines under North Carolina General Statutes§90-95(a)(3).

FIRST QUESTION: Whether the action of the North Carolina Supreme Court in upholding a seizure of a certain bottle of pills, which the officer saw and seized while in the process of arresting the defendant, Crews, in his residence on an unrelated matter, when the said police officer had no knowledge or information that the pills seized were contraband, violated the defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution, thereby also invalidating the subsequent search warrant and seizures?

SECOND QUESTION: Whether or not the action of the North Carolina Supreme Court in refusing to pass upon the question of an unconstitutional delegation of authority by the North Carolina General Assembly to the State Board of Health, under which the State Board of Health was permitted to change the classification and punishment of a crime from a misdemeanor to a felony, leaves standing a grievous injury to the constitutional rights of the defendants in violation of the Due Process clause and equal protection clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Constitution of the United States, Amendment XIV, Section 1:

". . . no shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

The facts relevant to the Petition in regard to Questions Presented No. 2 are uncontroverted and therefore may be introduced to the Court in a summary fashion. With regard to Question No. 1, certain relevant portions of the voir dire examination, evidence and rulings are included and attached as App. C. infra, P. c1.

On the morning of the 16th day of May, 1973, at approximately 4:00 AM, two officers, Officer Spillman and Officer Rogers of the

Winston-Salem Police Department arrived at the residence occupied by the Defendant, Jerry Milton Crews, for the purpose of serving an instanter capias arising out of a domestic case. At this time, the defendant, Deborah Leigh Parrish, was also occupying this residence. The officers arrived, knocked on the door, and were met at the door by another occupant, Miss Wall, who answered the door. The officers entered the residence and walked back to a bedroom where they observed the defendant, Jerry Milton Crews, lying in bed, and the defendant, Deborah Leigh Parrish was also present. The officers thereupon, advised the defendant, Jerry Milton Crews, that they had a capias to serve upon him. Although the evidence is conflicting on this point, according to the evidence most favorable to the State, the defendant, Jerry Milton Crews, got out of bed, put on a pair of shorts that were lying beside the bed and opened a closet door and walked inside to get some clothes. While the closet door was open and Jerry Milton Crews was in the process of getting his clothes, Officer Spillman observed a brown bottle on the top shelf of the closet, which contained what "looked like several hundred pills", entered and seized said bottle. The officer further testified on voir dire "at that time, I did not know what - - whether it contained vitamins, aspirin, bufferin, or anything of that nature. And, even after I opened the bottle and put some out in my hand, I did not know what the substance was."

Officer Spillman further testified on voir dire that he had seen amphetamines before. That there were no markings on the bottle to identify it. And it had no odor from the pills. The officer further testified "The ones in that particular bottle the first time that we was there, I don't - - I don't recall what shape they were or the color because there was some green pills found, yellow pills - - I don't recall what color the pills were in this particular brown bottle. They were tablets. I don't recall what color these were. I don't recall if they were white. . . . In fact, I had to call a narcotics officer to get some sort of test made to determine what it was after we got down to the police station. The narcotics officer came. He performed preliminary test of the pills. But, at the time we received the articles, I assumed it to be either amphetamines or barbiturates."

Officer Spillman, who seized the brown-tinted bottle of pills further testified during the course of the trial, after which renewed motions were made by the defendants to suppress, exclude and strike the evidence seized, as follows:

"In my opinion, such large quantity as that in a bottle of that size without having any kind of markings as far as prescription writing on the outside labeling of the bottle and that large quantity of pills, I figured them to be either amphetamines or barbiturates, some kind of contraband. In fact, I couldn't tell whether they were amphetamines or barbiturates. I didn't know whether they could have been vitamins, bufferin, or any other type of pill, but after examining the pills, I have seen - - That was after I had seized them and took them in my possession and opened them. And I saw them sitting wherever I saw them sitting, I knew this container contained pills. But, I didn't know what the pills contained. But as I testified before, I only had an opinion as to what they were. Well, amphetamine and barbiturates, it would take some type of chemical or somebody highly trained in that field to determine whether they were barbiturates or amphetamines or what kind of pills they were. They come in different colors, shapes, forms, sizes. I can't look at a pill and tell whether or not it's a controlled substance. I have seen amphetamines that look identical to the pills that were in that bottle. Pills come in so many different sizes, shapes, forms colors and on some pills, by the pharmacy, have a marking on them to some extent. I'm not an expert in identifying pills. I cannot explain to the jury how they can identify an amphetamine."

Not only Officer Spillman, who seized said bottle of pills, but also Officer Rogers who accompanied him to Crew's residence, testified that at the time the brown-tinted bottle of pills was seized, there was no evidence or contraband apparent to them:

"I cannot explain to the jury what an amphetamine pill looks like, because it's different forms and it can be different forms or shapes. I really don't know what is different about amphetamine than any other type pill. I really don't know the difference between

the appearance of an amphetamine pill and any other type pill. I didn't have any reason to believe these pills were amphetamines. I don't know what they were. I'm not sure that amphetamines come in colored capsules. . . . I can't tell this jury how they can recognize an amphetamine pill, not entirely. And if you had an amphetamine pill in this hand and a vitamin pill in this hand, and asked me to tell you which one was which, I couldn't."

Officer Long, the narcotics officer, called to the police station to perform preliminary tests on the bottle of pills seized, likewise testified:

". . . And, at the time I arrived, I was shown a bottle. I was handed the bottle, several hundred pills in it. The cap was on the bottle. And in examining and looking at the bottle prior to taking anything out, I could tell what was in it. It was several hundred pills. I didn't know what the pills had in them.

And from the physical - - from an eye examination of the bottle and the condition that it was handed over to me, I could not say that it was a controlled substance. Not by just looking at the pills, I couldn't. When I examined the bottle, the room was well lighted. It was in the narcotics office. He met me up there. I can't be sure I was handed the bottle so that I was holding it in my hand at the time I examined it. I'm sure I saw the bottle before it was handed to me. I determined there was some contents in the bottle, the first time I looked at it. I was probably four feet or maybe a little further from the bottle when I first looked at it. I opened the bottle. I took some of the contents out of the bottle, and held them in my hand. At that point, I could not tell what these pills or the substance I had in my hand contained, not by just looking at the pill, you can't tell what is on the inside of them. So, even after physical examination of the tablets outside in my hands, I could not identify what the substance was. No way by just looking at them."

Even the State's expert witness, Norman H. Leake, a chemist who analyzed some samples of the seized bottle of pills, testified:

". . . I cannot, by looking through these two bottles, tell

you which one of them, if either one, would contain a controlled substance. . . .
And if I had walked into someone's apartment and saw either one of these three bottles on a shelf in a closet - - either one, these two or that one over there, on a shelf in a closet, I would not have known that any portion of the same was a controlled substance; not by looking at them. I would not know that there was any law being violated by looking at them. It might have contained any kind of substance. Looking at this bottle from here I can see tablets from here or what appears to me to be tablets. . . .
They just look like tablets to me."

At the time of this seizure the officers had no evidence whatsoever that the defendant was in any way connected with the possession, use and sale of any controlled substance or narcotic drugs. The Trial Court in making its findings that the seizure was not illegal said "Well, I think it would arouse my suspicion if I walked in and saw a large bottle with a large number of pills . . . So if he saw these pills there and in this day and time, when you have drugs as one of the worst things we have going in this country, then he had - - " MR. FRYE: "He did not know." COURT: "He was exercising his bird-dog instinct as a good police officer. I would say," The Court after making these statements denied the defendants' motion to suppress the evidence of the brown bottle seized and the evidence obtained in a subsequent search with a search warrant, which warrant was obtained after a preliminary analysis of the contents of the brown bottle.

The Court's findings of fact, conclusions of law and ruling on the motion to suppress are attached as App. C, infra, pp. c1. As more and more evidence showed that Officer Spillman had no probable cause nor knowledge of what he had seized until preliminary tests were performed on them at the police station, the defendants continued to renew their motion to suppress and motions to strike evidence admitted as a result of the unlawful seizure. all of which were denied by the Trial Court.

After the defendants were found guilty, and the defendant Crews was given 4 years active sentence and a probation sentence, and Parrish given 2 years active plus probation, an appeal was made to the North Carolina Court of Appeals which affirmed the decision. Then an appeal was made to the Supreme Court which in a separate decision affirmed the judgment of the Court of Appeals, with Justice Sharp (now Chief Justice) dissenting.

The facts necessary to consider in the second question raised are uncontroverted and may be set forth as they are set forth in the opinion of the North Carolina Supreme Court.

"On 16 May 1973, amphetamines were listed as a Schedule III controlled substance in G. S. Section 90-91 (a) (1971 Cumulative Supplement). On that date, possession of any amount of a Schedule I or Schedule II substance was a felony. G. S. Section 90-95(c). Possession of a Schedule III or Schedule IV substance was a misdemeanor. G. S. Section 90-95(d). On May 17, 1973, G. S. Sec. 90-90 and G. S. Sec. 90-91 were amended by the General Assembly so that amphetamines became a Schedule II substance. Chapter 540, Sections 5 and 6, 1973 Sessions Laws. The offense here occurred on 16 May 1973, on which date, under G. S. Section 90-91(a), amphetamines were a Schedule III substance, the possession of which was a misdemeanor. G. S. Section 90-95(d). However, by order dated 23 March 1972, effective 24 April 1972, the State Board of Health (now Commissions of Health Services), acting within its delegated authority pursuant to G. S. Section 90-88 (1971 Cumulative Supplement), re-classified amphetamines from a Schedule III substance to a Schedule II substance. Under the law at that time G. S. Section 90-95(c), possession of any amount of a Schedule II substance was a felony."

This question was not raised during the trial of this case on appeal to the North Carolina Court of Appeals. It was raised, however, before the Supreme Court of North Carolina. After discussing the fact of this question to some degree, the Court stated that the constitutionality of North Carolina General Statutes 90-88 would not be passed upon since it was not discussed in the lower court.

REASONS FOR GRANTING THE WRIT

I.

The plain view doctrine is not applicable to the facts of this case. The views of the Petitioners on this issue coincide completely with the dissent filed in the opinion of the Supreme Court of the State of North Carolina by Justice Susie Sharp (now Chief Justice) wherein she states:

"Although the officers conceded they could not know the nature of the contents they 'thought they knew what it was'. It came to Officer Spillman 'as being some kind of contraband, possibly amphetamines'. Crews and the bottle were taken to the County jail. Long, a narcotics' officer, ran preliminary tests on some of the pills in the bottle and found them to be amphetamines. He testified that he could not say the pills contained a controlled substance merely by looking at them. On the basis of this evidence, Crews was arrested upon a warrant charging him with the possession of amphetamines with the intent to distribute, and a warrant authorizing the search of Crews' apartment was issued. When the officers returned to the apartment the pasteboard box, which had been on the closet shelf, was found concealed beneath a bed. It contained several thousand multicolored pills.

"On 21 May 1973 a toxicologist at North Carolina Baptist Hospital analyzed the pills taken from the defendants' apartment. He found the pills in the box (Exhibit 1) and the brown bottle (Exhibit 1-B) to contain amphetamines. He testified that, without having made a chemical analysis, he could not have known that the pills contained a controlled substance; that merely by looking at the bottle of pills he would not know that 'there was any law being violated'."

"The Trial Judge's findings that the officers were legally in defendants' bedroom and that the brown bottle on the closet shelf

was in plain view was clearly supported by the evidence. In my view, however, neither his finding of fact that 'the contraband was seen in plain view', nor his legal conclusion that the later-issued search warrant was valid, can be supported.

"In plain view was only a brown bottle containing pills. The bottle itself was not contraband. Obviously it was impossible by sight to identify pills in a glass bottle, tinted brown and bearing no label, as amphetamines, or any other controlled substance. The evidence conclusive establishes that, even after opening the bottle and scrutinizing the pink pills which it was found to contain, neither Officers Spillman and Rogers nor Officer Long could say whether they contained amphetamines. A chemical analysis at the police station was required to establish that the pills were contraband."

The plain view doctrine is firmly embedded in our law and this Court laid down the rules for its application in *Coolidge vs. New Hampshire, 403 US 443, 91 S.CT. 2022, 29 LEd 2d 564 (1971),* in which the Court stated at page 466, 91 SC 2038, "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification - whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused - and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

In the case of *Stanley vs. Georgia, 394 US 557, 569 et seq,89 S. Ct. 1243, 22 L Ed 2d 542 (1969),* Mr. Justice Stewart, in writing a concurring opinion in which he was joined by Mr. Justice Brennan and Mr. Justice White, stated "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity or

criminal evidence in plain view." In this case officers had seized certain reels of film which were alleged to be obscene after the officers had run them on a projector.

In applying the doctrine laid down by this Court in *Coolidge vs. New Hampshine (supra) and Stanley vs. Georgia, (supra),* that in order for a plain view search to be valid, the illegal nature of the item to be seized must be apparent, the highest Courts of numerous states have ruled on factual situations similar to the instant case and virtually every instance, these Courts have held that the contraband nature of the item seized was "not apparent" and ruled the seizures to be illegal.

In the case of *Shipman vs. State, 291 Ala. 484, 282 So. 2d 700 (1973)* the Supreme Court of Alabama faced this identical issue. In that case an officer who was justified in stopping a vehicle and asking for an explanation of the actions of the operator and passengers observed one occupant of the vehicle shift some cellophane packages, containing a white powder, from one hand to the other hand and then conceal them in his boot top. The officer testified that he did not know what the white powders were. The officer seized the powders, had an analysis made and charged the defendant with possession of heroin. The Alabama Court stated: "It is well settled that one cannot make a search legal by what it turns up. *Wong Sun vs. United States 371 US 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); Dennis vs. State 40 Ala. App. 182, 11 So 2d 21 (1959).* Furthermore, it has been held that for plain view to justify a warrantless seizure, the incriminating character of the object must be apparent. *Coolidge vs. New Hampshire, supra; Stanley vs. Georgia, supra;* (concurring opinion of J. Stewart)."

The Tennessee Court in *Armour vs. Totty 486 SW 2d 537(Tenn. 1972)* holds, that as to the requirement of whether the incriminating nature of the object in plain view is apparent, "This requirement must be likened to the standard for probable cause, a reasonable belief . . . "

Another similar case is *State vs. Elkins, 245 Ore. 279, 422 P 2d 250 (1966).* In that case the defendant received a conviction of possession of narcotics where the officer seized pills which he did not

know to be contraband, but of which he was suspicious. The Court stated at page 252, "Before the officer had the right to seize the implement of a crime committed in his presence . . . he must have reasonable grounds to believe that the article he has seized is contraband and therefore a crime is being committed." The Court further stated at page 254, "It is not enough that the officer suspected in good faith. His suspicion must be reasonable."

In the case of *Nicholas vs. State 502 SW 2d 169 (C.C.A.Tex. 1973)* the officers entered the defendant's apartment to arrest the defendant on a fugitive warrant. There in plain sight, the officers saw some negatives which they picked up and held to the light in order to see. The Court held that since the nature of the negatives was not apparent until their examination by holding them up to the light that their seizure was illegal. In the instant case until the officers took the brown bottle of pills of the shelf, opened it and poured the pills into his hand, the officer could not have been aware of the color or shape of the pills, and even then could not know the same was a controlled substance.

In the case of *State vs. Meichel, 290 So. 2d 878 (La 1974)* an officer observed a bottle of pills lying on the front seat of the defendant's car. Subsequently, the officer removed the bottle of pills from the car. The Court held at page 880, "In the instant case the testimony of an officer making the seizure is clearly to the effect that he did not know the nature of the pills until after he had picked up the bottle and examined it. He did not know at the time he saw the pills that there was a probability that they were contraband and probably evidence. This seizure does not fall within the plain view exception to the warrant requirement."

In the case of *State vs. Matthews, 216 NW 2d 90 (S.D. 1974)* the Court held at page 100, "The 'plain view' exception however does not apply to sealed packages the appearance of which is not indicative of their illicit contents."

In the case of *United States vs. Smollar, 357 F.Supp.628 (S.D.N.Y. 1972)* the District Court of the Southern District of New York stated that government officers must have more than mere probable cause that what they see is seizable since a probable cause standard would undermine the warrant requirement.

In the majority opinion in the instant case, the Supreme Court of North Carolina refused to follow the doctrine laid down in *State vs. Meichel (supra)* in which it was stated: "A policeman does not have the right to seize any object in his view in order to examine it and determine if it is or would be evidence in a criminal prosecution. An object in plain view may be seized only where it is readily apparent that the object is contraband or evidence." The majority opinion made no finding that the illegal nature of the object seized by Officer Spillman was apparent to the officer. In deed the only finding by the majority opinion was "He testified that he had some training in drug detection, that he had seen amphetamine pills before and that the pills in the bottle *looked like* amphetamines." The majority opinion ignored the fact that Officer Spillman also testified that the pills also *looked like* aspirin tablets, vitamins, bufferin and many other forms of completely legal pills. The majority opinion also ignored the facts as found in the minority opinion by Justice Sharp, "Although the officers conceded they could not know the nature of the contents, they *thought* they knew what it was. It came to Officer Spillman as being some kind of contraband, *possibly* amphetamines." At another point in his testimony, Officer Spillman stated that he thought it possibly could be amphetamines or barbiturates, but Officer Spillman also testified when asked the question, "Would you tell the jury how they can identify an amphetamine?" that there was no way to tell the jury how to identify an amphetamine and that amphetamines came in all shapes and many different shapes, sizes and colors. Officer Long, a trained narcotics officer who ran the preliminary tests on the pills, testified that he could not say the pills contained the controlled substance merely by looking at them. The toxicologist at the North Carolina Baptist Hospital, a PHD, whose sole employment deals in the analysis of

suspected illegal drugs testified that without having made a chemical analysis he could not have known that the pills contained a controlled substance, that merely by looking at the bottle of pills he would not know that 'there was any law being violated'. Indeed the Trial Court in its findings of fact and conclusions of law on the voir dire and motions to suppress found only "That both officers *thought* the pills were amphetamines or barbiturates . . . " The officer at the time of the seizure was not acquainted with either of the defendants and the Trial Court in his findings found as a fact that Officer Spillman knew nothing of the defendants or any reputation that they might have had for dealing in drugs.

A reading of the testimony of Officer Spillman concerning the seizure, as set forth in Appendix C, clearly shows that at best, Officer Spillman had a *mere suspicion* that the brown bottle he saw *might* have contained some form of illicit drug. There is absolutely no basis for the finding of the Trial Court or the Supreme Court that "Officer Spillman had reasonable grounds to believe that the bottle that was in plain view contained amphetamines." And it is respectfully contended that Justice Sharp was correct in the minority opinion in which she stated: "In my view, however, neither his finding of fact that the contraband was in plain view nor his legal conclusion that the later-issued warrant was valid, can be supported." All Officer Spillman knew at the time he seized the drugs by stepping into the defendant's closet and taking them into his hands was that he had seen a brown bottle apparently containing some form of pills in a closet belonging to a man that he had no knowledge or information to have ever dealt in, used or possessed any form of illicit drugs. It is respectfully contended that on those facts a Magistrate could not properly have issued a search warrant much less have given rise to the probable cause necessary for a warrantless search. It is therefore urged that the seizure of the brown bottle containing the pills and the subsequent issuance of a warrant based upon the said seizure were both violative of both defendants' rights under the defendants' Fourth and Fourteenth Amendments of the United States Constitution. In a colloquy with counsel just before ruling on the motion to suppress the Trial Court stated to counsel, "Well, I think it would arouse my

suspicion if I walked in and saw a large bottle with a large number of pills . . . he was exercising his bird-dog instinct as a good police officer, I would say." Clearly, mere suspicion based upon "a bird-dog instinct of a good police officer" is not the type of probable cause required under the doctrines of *Coolidge vs. New Hampshire supra* and *Stanley vs. Georgia supra.*

II

The Petitioners realize concerning question No. 2, that under ordinary circumstances this Court would not review an issue which was not raised in the Trial Court. This issue was, however, raised for the first time in the North Carolina Supreme Court and that Court said that it would not consider this question since it was not raised in the Trial Court. *State vs. Crews, 286 NC 41, 209 SE 2d 462 (1974).* However, the Petitioners would pray to the Court that the case of *United States vs. Atkinson, 297 US 157 56 S.Ct. 391, 80 L.Ed. 555 (1936),* would control in this case. In the *Atkinson* case, the Court stated at page 160, "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

The issue presented by question No. 2 was not raised at the Trial Court due to a rather complicated factual situation surrounding the actual status of the crime of possession of amphetamines. The North Carolina General Assembly, pursuant to North Carolina General Statutes §90-91(a)(1) (Supp. 1971), had designated amphetamines as a Schedule III substance under the Controlled Substances Act and had also specified that possession of such Schedule III substance would constitute a misdemeanor. (North Carolina General Statutes §90-95(a)(3), (d) (Supp. 1971).) Not until May 17, 1973, the day after the date of the offense for which Petitioners were convicted, did the North Carolina General Assembly change the

statutory law, to include amphetamines as a Schedule II substance, thereby rendering possession of such a felony. The North Carolina General Statutes §90-90 (c) (Supp. 1973) as codified by the Michie Company, the official publishers of the North Carolina General Statutes, however, reflected through its published supplements that the statutory law was in fact that amphetamines were a Schedule II substance and hence a felony. Only by referring to the actual Session Laws of the North Carolina General Assembly could one determine that such codification was not effective until May 17, 1973. The practice of the North Carolina Bar is to consult the supplements to the codified Statutes for a determination of current law; the Session Laws are not consulted normally unless some question arises which would bring attention to the fact that more specificity is required. Hence, there was no reason for the Trial Attorney to suspect that the law had been changed by the North Carolina General Assembly the day *after* the alleged offense of the Petitioners. A review of the law applicable to the case of Petitioners at the time of the trial - - ie, the Michie Supplements - - revealed only that the possession of amphetamines was punishable as a felony since amphetamines were listed as a Schedule II Substance. Hence, the Trial Attorney had no reason to consult the Session Laws. It should also be noted that the basic statutory book which contained the applicable law had been published in 1965 and had been supplemented and changed numerous times; therefore, when the supplement was consulted; there was no immediate reason to suspect a change in the law which would have affected the Petitioners' case - - it would have only been obvious that the North Carolina General Assembly had amended the law, such amendment being effective in 1973.

Because of the complicated sequence of events above narrated, the Trial Attorney was wholly unaware that the State was actually basing its charge of a felony against the Petitioners on an order of the State Board of Health, pursuant to North Carolina General Statutes § 90-88 (Supp. 1971) which had reclassified amphetamines from a misdemeanor Schedule III substance to a felonious Schedule II substance. Hence, unaware of this, the Trial Attorney had no reason to call into question this delegation of authority to the State Board

of Health. The Petitioners respectfully urge the Court that in a case such as this, that the defendants not be penalized and that the Court consider the question. The Petitioners contend that this is a case where the ends of justice require a determination by this Court as to whether or not this is a proper delegation of legislative power to an agency which was created by the General Assembly itself. Since this issue would be a question of law - and not a question of fact - and would therefore be an issue which would be decided by the Court, it is urged that this issue should be considered by this Court. A decision not to consider this issue would result in a miscarriage of justice. See *Evans v. Tripple R Welding and Oil Field Maintenance Corp., 472 F 2d 713 (5th Cir. 1973).*

The Petitioners refer to the case of *Hormel vs. Helvering, 312 US 552 61 S.Ct. 608,85 L.Ed. 1103 (1949),* which seems to be the leading case in the area of issues to be considered on appeal when not raised in the Trial Court. At page 55 of the *Hormel* case, the Court Stated:

"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which Courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged, would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

This Court had also stated in the case of *United States vs. Spector, 343 US 169, 170 72 S.Ct. 591,96 L.Ed.862 (1952), reh.dend.* (1952), that even though questions not raised below are not ordinarily considered on appeal to the Supreme Court, that in a case such as this where the question was not raised, nor briefed, nor argued in this Court, had it been raised, it might have been considered. Therefore, in the light of all these cases, the Petitioners urge the Court to consider this question of an unlawful delegation of authority by the General Assembly of North Carolina to the North Carolina State Board of Health.

Pursuant to North Carolina General Statutes §90-88 (See Appendix G), the North Carolina General Assembly gave to the State Board of Health the power to decide what substances should be scheduled within Schedules I through IV of the controlled substance portion of that Article. Pursuant to this delegated power, the State Board of Health did, in fact, on the 23rd day of March, 1972, promulgate an order, effective April 24, 1972, deleting amphetamines from Schedule II substance, and adding them to Schedule II. The significance of this change from Schedule III to Schedule II is that pursuant to North Carolina General Statutes § 90-95(d) (Supp. 1971), possession of Schedule III substances constituted only a misdemeanor, while possession of Schedule II substances constituted a felony. The maximum punishment for a misdemeanor was two years imprisonment, while for a felony, five years imprisonment was maximum. As stated in the facts, this alleged crime occurred on the 16th day of May, 1973, and yet this order was not enacted as statutory law by the General Assembly until the 17th day of May, 1973. On this date, the General Assembly amended North Carolina General Statutes 90-91, so that the amphetamines became a Schedule II substance. Ch. 540, 5,6,[1973] NC Session Laws, 853. However, on the 16th day of May, 1973, amphetamines were statutorily a Schedule III controlled substance pursuant to North Carolina General Statutes 90-91 (a) and therefore a misdemeanor. The amendment by the Legislature which rescheduled amphetamines became effective only upon ratification, Chp. 540, 8, [1973], N.C. Session Laws 854. The obvious result of all this action by the State Board of Health and the North Carolina General Assembly, is that the felony for which the Petitioners were charged and convicted was only a felony due to the action by the State Board of Health -- The General Assembly having made this same offense on the date it was allegedly committed, only a misdemeanor. The Petitioners respectfully contend that this delegation of power to the North Carolina State Board of Health was an improper delegation of legislative authority so as to deprive the Petitioners of equal protection under the laws. The petitioners acknowledge that the Legislature can delegate certain powers when circumstances are such that this would be in the best interest of public safety and welfare. However, it is a long

standing rule that the Legislature cannot delegate a power that is classified as a purely legislative function. In this case the delegating to the State Board of Health the right to decide what substances would be classified as a Schedule II or a Schedule III substance, in effect, allowed the State Board of Health to decide what drugs, the possession of which, would carry the punishment of a felony or a misdemeanor. See *1 Am.Jur.2d Admin L. 127 (1962).* This viewpoint is also accepted in North Carolina.

In the case of *State vs. Curtis, 230 NC 169, 52 SE 2d 364 (1949)* the Court stated at page 365:

> "[T]he Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of facts upon which the law makes or intends to make its own action depend * * *. This principal is in keeping with the Constitution of North Carolina, Article 2, 1, and with decisions in many cases in this State."

In the present case, the Petitioners acknowledge that the delegation of the power to the State Board of Health to consider various factors as set out in the Statute (See Appendix G) would be a proper delegation of authority to aid the Legislature in determining some facts or states of facts. However, the Legislature exceeded its power of delegation by delegating to the State Board of Health the power to determine the facts concerning different drugs when it also gave to them the power to determine which drugs should be classified under a provision which made the conviction of possession of that drug a felony or a misdemeanor. This right to decide that a violation of the Controlled Substance Act would be a felony or a misdemeanor is purely a legislative function and cannot be delegated to the State Board of Health. The Petitioners argue as stated in *Carolina-Virginia Coast. H. vs. Costal Turnpike Authority, 237 NC 52, 74 SE 2d 310, 316 (1953):*

> "Here we pause to note the distinction generally recognized between a delegation of power to make a law, which necessarily includes the discretion as to what it shall be, and the conferring

> of authority or discretion as to its execution. The first may not be done, whereas, the latter, if adequate guiding standards are laid down, is premissable under certain cercumstances."

The Court also stated in this case that the Legislature may delegate the power to find facts or determine the existence of or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or other agency of the government is to come into existence; it cannot vest in a subordinate agency the power to apply or withhold the application of a law in its absolute and unguided discretion.

In the *Curtis* case *supra*, at page 365, the North Carolina Supreme Court held that the North Carolina General Assembly could not delegate its power to a District Board of Health to make law and declare a criminal penalty for its violation. "Thus, in declaring it to be unlawful for any person to sell milk in the District without having first obtained a permit as required by Section Three of the Ordinance, and in prescribing criminal punishment for a violation of the requirement, the District Board of Health exceeded its authority."

In the case before this Court, the North Carolina General Assembly has done indirectly what it cannot do directly - - ie, allow the State Board of Health to re-classify certain drugs and thereby prescribe the criminal punishment for a violation of the possession of the same. In effect, the State Board of Health has been permitted via this statute, North Carolina General Statutes § 90-88, to specify that possession of amphetamines will constitute a felony. Whereas, the North Carolina General Assembly had previously determined that this crime was only a misdemeanor. To permit an administrative agency to determine that a particular action taken by a citizen is a misdemeanor or a felony is certainly contrary to the historical and philosophical basis on which our democracy rests. Essential to the preservation of Due Process of Law and the Equal Protection of the law, guaranteed to citizens of the States via the Fourteenth Amendment, is that determination of what constitutes a crime and the punishment therefor will be made only by the duly elected representatives of the people.

In the case before the Court, the North Carolina State Board of Health did determine the severity of the crime for which the Petitioners were indicted, tried and convicted. Petitioners contend that such action by the North Carolina State Board of Health was pursuant to an unlawful delegation of authority from the North Carolina General Assembly in violation of the Due Process of Law contrary to the Fourteenth Amendment of the United States Constitution and constituted a serious invasion of the rights of the Petitioners-one of whom has been sentenced to twice the maximum sentence permitted, solely due to this unlawful delegation of authority. If the North Carolina General Assembly wants to re-categorize a crime, it should do so itself; it should not try to unlawfully delegate such a responsibility to a purely administrative agency.

Petitioners respectfully urge this Court to find an unlawful delegation of authority by the North Carolina General Assembly and hence a deprivation of the rights of the Petitioners pursuant to the Fourteenth Amendment's Due Process and Equal Protection clauses.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED that this Court should grant certiorari in that the majority opinion of the North Carolina Supreme Court in this case is in direct conflict with the law established by this Court and followed by numerous state courts regarding the application of the 'plain view' doctrine to objects seized as evidence or contraband, which said seized object was not "apparent" to the officer seizing such object that the same was actually contraband or evidence at the time it was seized, but can only be determined whether the same is contraband or evidence after the same is seized by performing chemical test or further examination is made in some manner. It is respectfully contended by the Petitioners herein that the dissenting opinion written by Justice Sharp, (now Chief Justice) correctly states the law as established by this Court; nevertheless it is respectfully submitted that this Court should grant the writ in order to establish once and for all what is and is not

"apparent" within the meaning of the plain view doctrine exception to the search and seizure provisions of the United States Constitution.

It is further contended that the North Carolina General Assembly violated the long standing principle that the Legislature cannot delegate to an administrative agency the authority to pass an order or make a law which thereby carries a criminal punishment for the violation of the same order or law. This power is a pure legislative function and the delegation of this function is in violation of the Due Process and equal protection clause of the United States Constitution and the North Carolina Constitution.

It is therefore respectfully submitted that this Petition for Writ of Certiorari to the Supreme Court of North Carolina should be granted.

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APPENDIX A

OPINION AND DISSENTING OPINION

OF SUPREME COURT OF NORTH CAROLINA

SUPREME COURT OF THE STATE OF NORTH CAROLINA

No. 47.

STATE OF NORTH CAROLINA

vs.

JERRY MILTON CREWS and DEBORAH LEIGH PARRISH

Filed on the 26th day of November, 1974

Defendants were convicted in the Forsyth County Superior Court, William Z. Wood, J., of possession of amphetamines, and the convictions were affirmed by the Court of Appeals, *22NC App. 171, 205 SE 2d 765.*

Appeal by defendants from the decision of the Court of Appeals, reported in *22 NC App. 171, 205 SE 2d 765 (1974),* which found no error in the trial before Wood, J., at the 27 August 1973 Session of Forsyth Superior Court.

On indictments proper in form, defendants were tried and convicted of possession of amphetamines, a Schedule II substance the possession of which was then a felony under the North Carolina Controlled Substances

Act. G.S.§90-86 et seq. (1971 Cumulative Supplement). From sentences imposed, defendants appealed to the Court of Appeals. From the decisions of the Court of Appeals, they appeal to this Court, pursuant to GS 7A-30 (1).

The State's evidence tends to show that at approximately 4 a.m. on 16 May 1973 Winston-Salem Police Officers Rogers and Spillman Went to 1021 Sunset Drive, Apartment G, in Winston-Salem, to serve a capias on defendant Crews for failing to appear in court in a nonsupport case. Beverly Lee Wall, who was spending the night in the apartment's living room, answered the door. The officers asked for Crews, and she answered that he was in the back bedroom. The officers proceeded there and turned on the overhead light. The two defendants were in the bed. Miss Parrish was partially in a lying and sitting position with covers on. Crews had awakened and was lying nude in the same bed. The officers informed him that they had a capias for his arrest and that he was to come with them. He put on a part of undershorts that was lying beside the bed and proceeded into a walk-in closet to get outer clothing. Officer Spillman followed Crews to the closet and noticed a clear, brown-tinted bottle about five inches high and two to three inches in diameter located on the front of the shelf above the clothes that were hanging in the closet. The bottle had no writing or labels on it. It appeared to Officer Spillman to contain pills of various colors. Officer Spillman took Crews and the bottle to the police station. The bottle was found to contain several hundred amphetamines. Police officers then procured a search warrant and returned to the apartment. There they found several thousand more amphetamines in a pasteboard box under the bed in which defendants had been sleeping.

Other facts pertinent to decision are set out in the opinion.

Atty. Gen. Robert Morgan by John R. B. Matthis, Asst. Atty. Gen., Raleigh, for the State.

McElwee, Hall & McElwee by John E. Hall, North Wilkesboro, for defendants-appellants.

MOORE, Justice.

Defendants first contend that the Trial Court erred on vior dire in placing on them the burden of going forward on their motions to suppress evidence obtained by the police officers at defendants' apartment. Shortly after the jury was impaneled, defense counsel made a motion to suppress the amphetamines as the fruit of an unlawful search. At that time the jury was excused and a voir dire examination of witnesses was conducted. Defendants first introduced evidence covering some 47 pages of the record, and the State introduced evidence covering some 33 pages. After all the testimony, the Trial Judge made findings and admitted the evidence.

In support of their contention, defendants cite *State v. McCloud, 276 NC 518, 525, 173 SE 2d 753, 758 (1970),* where it is stated:".... And one who seeks to justify a warrantless search has the burden of showing that the exigencies of the situation made search without a warrant imperative. [Citations omitted.]" Defendant confused the "burden of proof" with the "burden of going forward". The Trial Court in the present case in compliance with McCloud, clearly and correctly stated that the State has the burden of proving the admissibility of evidence, and properly differentiated this burden from the burden of going forward, when it said: "[T]he Court is considering that regardless of the way the evidence is put on, . . . the burden of proving is on the State at all times . . ."

[1] When the defendant objects to the admissibility of the State's evidence on the ground that it was obtained by unlawful search, it is the duty of the Trial Court, in the absence of the jury, to hear the evidence of the State and of the defendant regarding the lawfulness of the search and seizure and to make findings thereon. *State v. Eppley, 282 NC 249, 192 SE 2d 441 (1972); State v. Pike, 273 NC 102, 159, SE 2d 334 (1968); State v. Myers, 266 NC 581, 146 SE 2d 674 (1966).*

[2] Here, both the State and the defendants were afforded on voir dire, ample opportunity to establish the facts as they believed them to be. The record shows that examination of each witness was extensive and penetrating. Our research has discovered no case holding that the order of offering testimony is a factor to be considered in determining

the fairness of a voir dire hearing. The important requirement was met in that defendants and the State were each afforded equal opportunity to present their case to the Trial Judge on voir dire. Defendants' first assignment is therefore overruled.

Defendants next assign as error the introduction of the pills seized in the apartment before defendant Crews was taken to the police station and the introduction of the pills seized pursuant to a search warrant obtained on the basis of the first seizure.

On voir dire Officer Spillman testified that he was at defendants' apartment for the purpose of serving a capias on defendant Crews; that he was invited in by Miss Wall and was told by her that Crews was in the backbedroom. The officers went there and found the two defendants in bed. When Crews was told that he was to accompany the officers to police headquarters, he got out of bed and went toward a closet to get his clothes. The light was on and Officer Spillman testified he looked toward the closet and saw on the shelf a clear, brown-tinted, pint-size bottle that contained several hundred multi-colored pills. As the officer picked up this bottle, Crews said, "Hey, wait a minute. Those are not mine." As Crews was walking down the hall, the officer heard defendant Parrish ask Crews, "What about the others?"

[3] The officers then took Crews and the bottle to police headquarters, and the bottle was found to contain approximately eight hundred amphetamine tablets. A warrant was issued for Crews charging him with possession of amphetamines with intent to distribute, and a search warrant was procured for the apartment. The officers returned to Crews' apartment where they found defendant Parrish lying on the bed with a .22 automatic rifle "jammed" with a live cartridge lying beside her. After taking the rifle, they looked in the closet for a pasteboard box that they had previously seen on the shelf, but it was not there. They found the box under the bed on which defendant Parrish was sitting. It contained several bottles of pills and some loose pills - - several thousand in all - - which a later examination showed to be amphetamines. Upon hearing this and other testimony, the Trial Court, after making findings of fact, overruled defendants' objection to the

introduction of the pills into evidence. The Trial Court found that the officers were on the premises legally, that the bottle was in plain view, and that no search was required for its seizure. Such finds, when supported by competent evidence, are conclusive on appellate courts. *State v. Lock 284 NC 182, 200 SE 2d 49 (1973); State v. Johnson, 280 NC 295, 185 SE 2d 689 (1971); State v. McKay* and *State vs. Simmons, 277 NC 410, 177 SE 2d 874 (1970).*

"This constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary and where the contraband subject matter is fully disclosed and open to the eye and the hand." *State vs. Harvey, 281 NC 1, 11, 187, SE 2d 706, 713 (1972).* Accord, *State vs. Virgil, 276 NC 217, 172, SE 2d 28 (1970).*

[4] Officer Spillman was legally in the apartment. He testified that he had had some training in drug detection, that he had seen amphetamine pills before, and that the pills in the bottle looked like amphetamines. He further testified that the size of the bottle, the large number of pills, and the fact that there were no prescription or label on the bottle, all led him to believe that they were amphetamines.

"When an officer's presence at the scene is lawful, . . . he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime . . . " *1 Stansbury's NC Evidence 121a (Brandis Rev. 1973).* Accord, *Harris v. United States, 390 US 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067 (1967); State vs. Harvey,* supra; *State v. DuBoise, 279 NC 73, 181 SE 2d 393 (1971).*

We hold that under the facts in this case, Officer Spillman had reasonable grounds to believe that the bottle, which was in plain view, contained amphetamines, and that the Court properly overruled defendants' objection to the admission of the pills found in the bottle.

[5] Since the bottle contained amphetamines, this fact, coupled with defendant Parrish's statement, "What about the others?", was ample to constitute probable cause for the issuance of the search warrant

under which the box of amphetamines were seized.

The assignment of error to the admission of the amphetamines is overruled.

Defendants finally contend that they were deprived of equal protection under the laws by the fact that they were tried and convicted for a felony when the laws of this State made the offence for which they were charged a misdemeanor.

On 16 May 1973, amphetamines were listed as a Schedule III controlled substance in G. S. § 90-91 (a) (1971 Cumulative Supplement). On that date, possession of any amount of a Schedule I or Schedule II substance was a felony. G. S. § 90-95 (c). Possession of a Schedule III or Schedule IV substance was a misdemeanor. G. S. § 90-95 (d). On 17 May 1973, G. S. § 90-90 and G. S. § 90-91 were amended by the General Assembly so that amphetamines became a Schedule II substance. Chapter 540, Sections 5 and 6, 1973 Session Laws. The offense here occurred on 16 May 1973, on which date, under G. S. § 90-91 (a), amphetamines were a Schedule III substance, the possession of which was a misdemeanor. G. S. § 90-95 (d). If these were all the pertinent facts, defendants' contention would be correct. However, by order dated 23 March, 1972, effective 24 April 1972, the State Board of Health (now Commission for Health Services), acting within its delegated authority pursuant to G. S. § 90-88 (1971 Cumulative Supplement), reclassified amphetamines from a Schedule III substance to a Schedule II substance. Under the law at that time (G. S. § 90-95 (c)), possession of any amount of Schedule II substance was a felony.

The State Board of Health, in rescheduling substances under the Controlled Substances Act, was acting under detailed guidelines established by the General Assembly in G. S. § 90-88, which in pertinent part provided:

> "Authority to control, - (a) . . . In making a determination regarding a substance, the North Carolina State Board of Health shall consider the following:
>
> (1) The actual or relative potential for abuse;

(2) The scientific evidence of its pharmacological effect, if known;

(3) The state of current scientific knowledge regarding the substance;

(4) The history and current pattern of abuse;

(5) The scope, duration, and significance of abuse;

(6) The risk to the public health;

(7) The potential of the substance to produce psychic or physiological dependence liability; and

(8) Whether the substance is an immediate precursor of a substance already controlled under this Article."

"(b) After considering the required factors, the North Carolina State Board of Health shall make findings with respect thereto and shall issue an order adding, deleting or rescheduling the substance within Schedules I through VI of this Article."

G. S. §90-88 also provided that a public hearing must be held prior to the adding, deleting or rescheduling of any controlled substance within Schedules I through VI. Prior notice of such hearing must be placed in three newspapers of State-wide circulation. The statutes then provided for notice to the public of rules amended or promulgated by the Board by filing copies in the office of the Secretary of State and with the Clerk of the Superior Courts. G. S. §143-105; G. S. § 143-198.1.

(6) Counsel for defendants in his brief admits that the contention regarding whether the acts of defendants constitute a misdemeanor or a felony was not raised in the Superior Court or in the Court of Appeals. This Court will not decide questions which have not been presented or adjudicated in the courts below, especially questions relating to the constitutionality of a statute. As we said in *State v. Jones, 242 NC 563, 89 SE 2d 129 (1955);* ". . . [I]n conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below. [Citation omitted.]" Accord, *State v. Cumber 280 NC 127, 185 SE 2d 141 (1971); State v. Dorsett* and *State v. Yow, 272, NC 227, 158 SE 2d 15 (1967).* Since the question of the constitutionality of G. S. 90-88 was not before the Superior Court or the Court of

Appeals, it is not properly before us. Therefore, we do not pass upon the constitutionality of this statute.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

BOBBITT, C. J., not sitting.

SHARP, Justice (dissenting):

As I see it the "plain view" doctrine is not applicable to the facts of this case, and the trial judge erred in overruling defendants' motion to suppress State's Exhibit 1, a box containing several thousand pills, and State's Exhibit 1-B, a brown glass bottle containing several hundred pills, for the reason that they were the fruits of an unconstitutional seizure. In brief summary, the State's evidence tended to establish the following facts:

About 4:00 a.m. on 16 May 1973, R. A. Spillman and D. W. Rogers police officers of the City of Winston-Salem, for the purpose of serving an instanter capias upon defendant Crews, went to the apartment occupied by the defendants. They were admitted to the apartment by a third occupant, who directed them to the room where defendants were sleeping. The officers arrested Crews and directed him to get dressed in order to go to jail. When Crews started toward the closet, the door of which was open, the officers observed a pint bottle of clear brown glass, which they could see contained several hundred pills. When Spillman reached up to take the bottle off the shelf Crews said "Hey, wait a minute. These are not mine." There was no label or identification whatever on the outside of the bottle. On the shelf next to the bottle was a pasteboard box.

Although the officers conceded they could not know the nature of the contents they "thought they knew what it was". It came to Officer Spillman "as being some kind of contraband, possibly amphetamines". Crews and the bottle were taken to the county jail. Long, a narcotics' officer ran preliminary tests on some of the pills in the bottle and found

them to be amphetamines. He testified that he could not say the pills contained a controlled substance merely by looking at them. On the basis of this evidence Crews was arrested upon warrant charging him with the possession of amphetamines with the intent to distribute, and a warrant authorizing the search of Crews' apartment was issued. When the officers returned to the apartment the pasteboard box, which had been on the closet shelf, was found concealed beneath a bed. It contained several thousand multicolored pills.

On 21 May 1973 a toxicologist at North Carolina Baptist Hospital analyzed the pills taken from the defendants' apartment. He found the pills in the box (Exhibit 1) and the brown Bottle (Exhibit 1-B) to contain amphetamines. He testified that, without having made a chemical analysis he could not have known that the pills contained a controlled substance; that merely by looking at the bottle of pills he would not know that "There was any law being violated".

The trial judge's finding that the officers were legally in defendants' bedroom and that the brown bottle on the closet shelf was in plain view are clearly supported by the evidence. In my view, however, neither his finding of fact that "the contraband was seen 'in plain view', nor his legal conclusion that the later-issued search warrant was valid can be supported.

In plain view was only a brown bottle containing pills. The bottle itself was not contraband. Obviously it was impossible by sight to identify pills in a glass bottle, tinted brown and bearing no label, as amphetamines, or any other controlled substance. The evidence conclusively established that, even after opening the bottle and scrutinizing the pink pills which it was found to contain, neither Officer Spillman and Rogers nor Officer Long could say whether they contained amphetamines. A chemical analysis at the police station was required to establish that the pills were contraband. See *People v. Marshall, 69 Cal. 2d. 51, 69 Cal. Rptr. 585, 422 P. 2d 665 (1968); Miramontes v. Superior Court for County of San Mateo, 25 Cal. App. 3d 877, 102 Cal. Rptr. 182 (1972).*

In point with this case is *State v. Meichel, 290 So. 2d 878 (La.1974).* In that case the officers moved a bottle of pills from the front seat of the defendant's automobile. They then searched the trunk of the vehicle

and found marijuana. In rejecting the State's contention "that the plain view seizure of the pills established probable cause for a search of the automobile" the Louisiana Supreme Court said:

"A policeman does not have the right to seize any object in his view in order to examine it and determine if it is or would be evidence in a criminal prosection. An object in open plain view may be seized only where it is readily apparent that the object is contraband or evidence. See *Coolidge v. New Hampshire, 403 US 443, 91 St.Ct. 2022, 2038, 29 L.Ed 2d 564 (1971).*

"In the instant case the testimony of the officer making the seizure is clearly to the effect that he did not know the nature of the pills until after he had picked up the bottle and examined it. He did not know at the time he saw the pills that there was a probability that they were contraband and probably evidence. This seizure does not fall within the plain view exception to the warrant requirement. As such the seizure violated defendants' constitutional rights and was illegal " *Id. 290 So. 2d at 880.*

In another recent decision, different factually, but applying the same general principles, the Supreme Court of North Dakota held that the "plain view" exception "does not apply to sealed packages the appearance of which is not indicative of their illicit contents." *State v. Matthews, 216 NW 2d 90, 100 (N. C. 1974).* In that case, the police had opened two sealed envelopes which they suspected contained marijuana. Their suspicions proved to be correct. However, the court nonetheless excluded this evidence. In concluding that the motion to suppress should have been granted it said: "When police assume the function of the magistrate, they act beyond the law and the evidence they obtain by so acting is excluded. In regrettable consequence, the guilty may go free, but the alternative - - permitting warrantless rummaging through private property - - is worse. The remedy for both evils is for the police to obey the law, not for the courts to ignore the Constitution." *Id. at 104.* With reference to the nonapplicability of the "plain view" exception to sealed packages, see *United States v. Sokolow, 450 F. 2d 324 (5th Cir. 1971). People v. Marshall, supra.*

In *Stanley v. Georgia, 394 US 557, 89 S.Ct. 1243, 22 L.Ed 2d 542 (1969)*, under a search warrant, federal and state agents searched defendants' home for evidence of bookmaking activities, which they did not find. However, they did find three reels of film. Using a projector and screen, which they found on the premises, they concluded that the films were obscene and seized them. The Supreme Court disposed of the case by holding that the Georgia Statute under which defendant was convicted was unconstitutional insofar as it made mere private possession of obscene matter a crime. In a concurring opinion, however, Justice Stewart, Brennan and White addressed themselves to the ruling of the Georgia Supreme Court that the films had been lawfully seized - - a preliminary issue which the majority opinion ignored.

In concluding that the films were inadmissible in evidence at the appellant's trial, the concurring Justices said: "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. . . . After finding them, the agent spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant. . . . To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." Id at 571-572, 89 S.Ct. at 1251.

In my opinion the "plain view" doctrine justifies a warrantless seizure only when it is apparent to the police that they have evidence or contraband before them. My vote, therefore, is to reverse.

File June 19, 1974

APPENDIX B

OPINION OF NORTH CAROLINA

COURT OF APPEALS

STATE OF NORTH CAROLINA

vs.

JERRY MILTON CREWS and DEBORAH LEIGH PARRISH

No. 7421SC294

. . COURT OF APPEALS OF NORTH CAROLINA . .

Defendants were charged with possession of amphetamines, and their cases were consolidated. After a jury was empanelled, each defendant entered a plea of not guilty and moved to suppress the evidence seized from their apartment.

On voir dire, the State presented evidence tending to show that they went to the apartment of Jerry Milton Crews to serve a capias on him for failure to appear in court. The officers rang the doorbell and knocked on the door. The door was answered by a Miss Beverly Wall who informed the officers that Crews was in a bedroom in the rear of the apartment. The officers proceeded to the bedroom, entered the room, turned on a light and informed the occupants of the room that they had a capias for Jerry Milton Crews. The occupants of the room - defendants Crews and Parrish - were in bed, and the police officers informed Crews that he must accompany them to the police station. Crews got out of bed and put on a pair of shorts which were lying on the floor next to the bed. Crews headed toward the bedroom closet, the door to which was open, and

as one of the officers looked in that direction, he spotted a brown tinted bottle containing a large quantity of pills.

Crews entered the closet and turned on the light. Officer Spillman followed him and took the bottle from the shelf. Both officers had been trained in drug identification, and both were of the opinion that the pills contained amphetamines.

The officers took defendant Crews to the police station, and they also took the bottle of pills. The narcotics agent who made preliminary tests on the pills determined that they were amphetamines. Officer Spillman thereupon obtained an arrest warrant for possession of amphetamines, and a warrant to search the apartment for other narcotics. The officers returned to the apartment and seized a cardboard box containing several thousand pills similar to those in the brown bottle. These pills were found in a box under the bed previously occupied by defendants.

The evidence thus seized was admitted over defendants objections, and the jury returned a verdict of guilty as charged as to both defendants. From the entry and signing of judgment defendants appealed.

Atty. Gen. Robert Morgan by Asst. Anny. General John R. B. Matthis, Raleigh, for the State.

Roberts, Frye & Booth by Leslie G. Frye and Gary W. Williard, Winston-Salem, for defendants-appellants.

MORRIS, JUDGE.

Defendants assign error to the introduction of the pills seized before defendant Crews was taken to the police station and the pills seized pursuant to the search warrant obtained on the basis of the first seizure. We hold that the trial court's findings of fact on voir dire were based on competent evidence, the conclusions of law were supported by the findings and the admission of the evidence was proper.

On voir dire, the facts concerning the seizure of the brown bottle of pills were contested. The principal feature of the evidence relied upon by

defendants is Crews' testimony that the officer opened the closet door and with the use of his flashlight saw a bottle on a shelf. The officer thereupon reached up to get the bottle from the shelf. The officers, on the other hand, testified that the closet door was open when they entered the room, and they followed Crews into the closet at which time he turned on the light. Officer Spillman testified that he was able to see the bottle on the shelf before he or defendant Crews entered the closet.

[1-3] It is completely obvious that the court's findings are supported by the testimony of both officers. Findings of fact made on voir dire are conclusive on appellate courts when supported by competent evidence. *State v. McVay* and *State vs. Simmons, 227 NC 410, 177 SE 2d 874 (1970).* The officers were on the premises legally, the bottle was fully disclosed and open to eye and hand, and no search was required for its seizure. The warrantless seizure was, therefore, permissible under the "plain view" doctrine. *State v. Harvey, 281 NC 1, 187 SE 2d 706 (1972); State v. Virgil 276 NC 217, 172 SE 2d 28 (1970).*

[4] Inasmuch as the seizure of the brown bottle was valid, there can be no doubt that probable cause existed for the issuance of the search warrant under which the box of amphetamines was seized. The assignment of error to the admission of this evidence is overruled.

[5,6] Defendants assign error to the trial court's instructions to the jury on the ground that it failed to define and apply the law to the evidence. We have carefully reviewed the charge, and we hold that, construed as a whole, it fairly and adequately explains the law. There is no merit to the assignment of error based on the court's failure to give equal stress to defendants' evidence. It is incumbent upon the court only to give a clear instruction applying the law to the evidence and the positions of the parties as to the essential features of the case. There is no requirement that the contentions of both sides be stressed equally. *State v. Reisch, 20 NC app. 481, 201 SE 2d 577 (1974).*

Defendants have presented multiple assignments of error based on literally hundreds of exceptions. We have reviewed each of defendants' contentions, and we find that they present no significant or novel questions of law that merit our further discussion.

No error.

CAMPBELL and VAUGHN, JJ., concur.

APPENDIX C

EXERPTS OF PERTINENT TESTIMONY, MOTIONS, RULINGS, ORDERS, VERDICT, JUDGMENT AND COMMITMENT OF TRIAL COURT

Testimony of Officer R. A. Spillman:

Voir dire - direct examination:

I looked towards the closet and I observed a brown clear bottle about a pint bottle which contained to me looked like several hundred pills . . . At that time I reached on the top shelf, got the bottle. . . . He got in the car, transported to the county jail. Served the capias on him. At this time we had called a narcotics officer en route to the county jail and we was met at that location, by Mr. C. T. Long, works in the Narcotics Division. He run preliminary tests on some of the pills which were in that bottle, it was approximately eight hundred pills in that pint bottle, and they were found to be amphetamines. At this time a warrant was drawn for Mr. Crews for possession of amphetamines with intent to distribute and I drawed the search warrant for that residence, ten twenty-one Apartment G which Mr. Crews stated he lived at . . . I had seen amphetamines prior to this night, I could identify them as possibly being amphetamines. What first attracted my attention to it was I could see the pills inside the jar and was several hundred pills without a prescription on the bottle. That came to be as being some kind of contraband, possibly amphetamines.

COURT: Pint bottle, you say?

A. Yes.

COURT: Was there any writing at all on the outside of the bottle or any label?

There was a number on top of the bottle. I think it was six hundred and some. It had a white cap on the bottle and he had a number placed on top of the bottle. Other than that, there was no writing, no identification as to what type of pills or who they belonged to.

Voir dire - cross examination:

At the time I observed the bottle on the shelf to contain several hundred pills and to me, it looked like contraband because a large number of pills in a bottle of that size without any kind of writing or prescription. At that time, I did not know what - - whether it contained vitamines, aspirin, bufferin, or anything of that nature. And, even after I opened the bottle and put some out in my hand, I did not know what the substance was. Well, I had an opinion. I thought they were amphetamines because I had seen amphetamines before. There were no markings on the bottle to identify it. And it has no oder. But the color and shape of it. The ones in that particular bottle the first time that we was there, I don't - - I don't recall what shape they was or the color because there were some green pills found, yellow pills - - I don't recall what color the pills were in this particular brown bottle. They were tablets. I don't recall what color these were. I don't recall if they were white. I had reason to know what they were. I answered that question. In fact, I had to call a narcotics officer to get some sort of test made to determine what it was after we got down to the police station. The narcotics officer came. He performed preliminary test of the pills. But, at the time we received the articles, I assumed it to be either amphetamines or barbiturates . . . . I customarily pick up any bottle of pills when I go into a house if it is that quantity, I would examine.

Direct examination:

As he was coming to the closet, I looked into the closet and just inside the closet door on a shelf, I observed - - Approximately a pint brown bottle, brown in color with a tint to it where you could see through it with a white cap sitting on that shelf beside a cardboard box.

As Mr. Crews walked inside the closet, I entered right in behind him and reached directly about head level to the closet to the shelf and before I - - you know - - looked in the closet and observed the pills to be in the bottle - - I retrieved the bottle. . . .

Cross examination:

In my opinion, such large quantity as that in a bottle of that size without having any kind of markings as far as prescription writing on the outside labeling of the bottle and that large quantity of pills, I figured them to be either amphetamines or barbiturates, some kind of contraband. In fact, I couldn't tell whether they were amphetamines or barbiturates. I didn't know whether they could have been vitamins, bufferin, or any other type of pill, but after examining the pills, I have seen - - That was after I had seized them and took them in my possession and opened them. And I saw them sitting wherever I saw them sitting, I knew this container contained pills. But, I didn't know what the pills contained. But as I testified before, I only had an opinion as to what they were.

Well, amphetamine and barbiturates, it would take some type of chemical or somebody highly trained in that field to determine whether they were barbiturates or amphetamines or what kind of pills they were. They come in different colors, shapes, forms, sizes. I can't look at a pill and tell whether or not it's a controlled substance. I have seen amphetamines that look identical to the pills that were in that bottle.

Pills come in so many different sizes, shapes, forms, colors and on some pills, by the pharmacy, have a marking on them to some extent. I'm not an expert in identifying pills. I cannot explain to the jury how they can identify an amphetamine.

I didn't know what I had in my possession until I went down and had it analyzed.

Testimony of Officer D. W. Rogers:

Voir Dire - Cross examination:

When Officer Spillman came out with a brownish colored bottle, I didn't know what was in that bottle.

Cross examination:

I cannot explain to the jury what an amphetamine pill looks like, because it's different forms and it can be different forms or shapes. I really don't know what is different about amphetamine than any other type pill. I really don't know the difference between the appearance of an amphetamine pill and any other pill. I didn't have any reason to believe these pills were amphetamines. I didn't know what they were. I'm not sure that amphetamines come in colored capsules. . . . I can't tell this jury how they can recognize an amphetamine pill, not entirely. And if you had an amphetamine pill in this hand and a vitamin pill in this hand, and asked me to tell you which one was which, I couldn't.

Testimony of Officer C. T. Long:

And, at the time I arrived, I was shown a bottle. I was handed the bottle, several hundred pills in it. The cap was on the bottle. And in examining and looking at the bottle prior to taking anything out, I could tell what was in it. It was several hundred pills. I didn't know what the pills had in them.

And from the physical - - from an eye examination of the bottle and the condition that it was handed over to me, I could not say that it was a controlled substance. Not by just looking at the pills, I couldn't. When I examined the bottle, the room was well lighted. It was in the narcotics office. He met me up there. I can't be sure I was handed the bottle so that I was holding it in my hand at the time I examined it. I'm sure I saw the bottle before it was handed to me. I determined there was some contents in the bottle, the first time I looked at it. I was probably four feet or maybe a little further from the bottle when I first looked at it. I opened the bottle. I took some of the contents out of the bottle, and held them in my hand. At that point, I could not tell what these pills or the substance I had in my hand contained, not by just looking at the pill, you can't tell what is on the inside of them. So, even after physical examination of the tablets outside in my hands, I could not identify what the substance was. No way by just looking at them.

Testimony of Norman H. Leake:

Cross examination:

I cannot, by looking through these two bottles, tell you which one of them, if either one, would contain a controlled substance. . . . And if I had walked into someone's apartment and saw either one of these three bottles on a shelf in a closet - - either one, these two or that one over there, on a shelf in a closet, I would not have known that any portion of same was a controlled substance; not by looking at them. I would not know that there was any law being violated by looking at them. It might have contained any kind of substance. Looking at this bottle from here I can see tablets from here or what appear to me to be tablets. . . . They just look like tablets to me.

Colloquy between Trial Court and Counsel for defendants during argument of motion to supress:

THE COURT:

" . . . in this case, there is no evidence that these officers knew anything about these pills being there. They weren't narcotics men. The evidence all tends to show that they didn't know anything about it and they say that. But, the fact that they called back and got the sergeant, the fact that they called the narcotics man indicates to me that they didn't know - - that this man is dealing in pills there. Finally, the plain view doctrine has been applied where a police officer is not searching for evidence against accused, but nonetheless, inadvertently and - - inadvertently comes across an incriminating object - - now isn't that the rule that we're dealing with here?

MR. FRYE: All right, if you concede that anything that would arouse one's suspicion would be incriminating evidence, but I submit to you that this officer did not testify he knew what was in the bottle.

THE COURT: Well, I think it would arouse my suspicion if I walked in and saw a large bottle with a large number of pills. . . . So if he saw these pills there and in this day and time, when you have

drugs as one of the worst things we have going in this country, then he had - -

MR. FRYE: He did not know.

THE COURT: He was exercising his bird-dog instinct as a good police officer, I would say.

MR. FRYE: If Your Honor please, he did not know that they were drugs. He was going on a fishing expedition.

Ruling by the Court:

THE COURT: I'm going to deny your motion and I'll make a proper finding, but, for the record at this time, the Court is holding that the search was - - that the arrest was a valid arrest; that the officers had a right to be there in this apartment, to arrest the defendant Crews, and that under a valid capias, instanter capias of the Superior Court for his failure to be in court and that they inadvertently found or saw the bottle of pills sitting in the closet when he went in there; that Officer Spillman inadvertently saw them when the defendant went into the closet to dress.

Motion to Suppress:

NOW COMES the defendant in the above styled and numbered cause and moves the court to suppress the evidence obtained as a result of an unreasonable and illegal search of the premises as set out in the United States Constitution and the decisions of the State and Federal Courts, and the illegal arrest of the defendant for the following reasons, one or more than one concurring, to wit:

That the arrest of the defendants in this cause, is illegal and contrary to the law in that:

1. That the officers effecting said arrest, although they had ample and sufficient opportunity to obtain a warrant and search warrant, effected said arrest without a warrant and illegally searched the said premises without [sic] the consent or permission of the defendant and without a search

warrant or other legal authority to do so, in order to effect said illegal arrest;

2. That the defendant committed no offense in the presence or or view of the arresting officers;

3. That the defendant had not committed a felony or breach of the peace in the presence or within the view of the arresting officers nor had any officer verbally ordered the arrest of the defendant;

4. That the defendant was not arrested in a suspicious place nor under due circumstances which reasonably showed defendant to have been guilty of a felony or breach of the peace, or, that the defendant was threatening or about to commit any offense against the law;

5. That no representation that a felony had been committed and that the offender was about to escape was made to the arresting officers;

6. That there was no probable cause on the part of the arresting officers to search said premises;

7. There was no reliable information to give the arresting officers probable cause to search said premises;

8. That there was no independent evidence observed by the arresting officers to substantiate any information that they might have received concerning defendant or the contents of said premises.

WHEREFORE, defendant prays that said evidence be suppressed and held by the court to be inadmissible in this cause against this defendant.

This the 11 day of September, 1973.

ROBERTS, FRYE & BOOTH
Attorneys for Defendant
By: Leslie G. Frye

(Verified by Jerry Milton Crews on September 11, 1973.)

Renewal of motion to suppress and motion to strike:

MR. FRYE: Again, Your Honor, we would again move that any evidence regarding articles seized on the first occasion or second occasion by excluded on the basis of being illegally obtained.

THE COURT: MOTION DENIED.

MR. FRYE: Your Honor, we would rest and again, renew the same motions.

THE COURT: MOTION DENIED in each case. You're renewing your motion as to each defendant?

MR. FRYE: Yes.

Findings of Fact and Conclusions of Law on Voir Dire:

Upon defendant's motion for a Voir Dire Hearing to suppress evidence as a result of an unreasonable search and seizure, the Court makes the following findings of fact:

The early morning hours of May 16, 1973, Officer D. W. Rogers, member of the Winston-Salem Police Department, obtained from the Forsyth County Sheriff's Department an instanter capias issued by the Forsyth County Superior Court for the arrest of the defendant, Jerry Milton Crews, for failure to appear in Superior Court to answer a charge of non-support of his minor son. Earlier he had learned the defendant might be found at 1021 Sunset Drive, Apartment G, Winston-Salem, North Carolina; the time was approximately 4:00 to 4:15 a.m. Officer Rogers radioed for assistance in serving the said capias and Officer R. A. Spillman met him at 1021 Sunset Drive. Upon arrival at the apartment door, they requested the radio operator to dial a telephone number they had for the occupants of Apartment G. Standing outside the door, they heard the phone ring and a short time later they knocked on the door and rang the doorbell. A white female answered the door and opened it a short way, at which time Officer Rogers announced they were police officers and had a capias for the arrest of the defendant, Jerry Milton

Crews, and where was he. The white female, later found to be Beverly Wall, opened the door wider and pointed to the bedroom, down a short hall, almost directly in front of the front door. There was a small light on in the living room but none in the hall and bedroom.

With Officer Rogers leading, the two officers went down the hall using their flashlight and went into the bedroom. There they found the defendant, Jerry Milton Crews, in the bed and the defendant, Debbie Parrish, sitting on the side of the bed. Officer Rogers stepped inside the bedroom and to his left and turned on the light switch and an overhead light in the center of the room came on. He told Mr. Crews to get up, he had a capias for him for failure to come to Court. Mr. Crews asked if it could not wait until morning and was told it could not, since there was a $200 bond required.

When Crews got out of the bed he was nude and put on a pair of under shorts laying on the floor beside the bed and started toward the closet. The door to said closet was open. When Crews started toward the closet, Officer Spillman turned and looked in the direction of the closet where he observed a brown-tinted pint plastic bottle with no label contraining several hundred pills in it sitting on the closet shelf beside a cardboard box. Crews went into the closet and turned on the light and Officer Spillman followed him. When Officer Spillman reached up to take the bottle off the shelf, Crews said "those are not mine". Officer Spillman came back into the bedroom followed by Crews and when he came into the sight of Officer Rogers, (he observed the bottle in Officer Spillman's hand and could see several hundred pills in the bottle from across the room.

(Both officers had had training in drug identification.)

And had seen bottles of this type and had observed amphetamine tablets before. Both officers thought the pills were amphetamines or barbiturates because of the number of pills, absence of label and previous training.

Mr. Crews went down the hall to the bathroom with Officer Spillman following him and (then the defendant Parrish came down the hall and went into the bathroom, also and tried to close the door, but was stopped

by Officer Spillman.)

While the two defendants were in the bathroom, Officer Spillman heard the defendant Parrish say to the defendant Crews, "Hey, what about the others?"

The officers then took defendant Crews, along with the bottle of pills, to the police station and requested a narcotic agent to examine and test the pills. They were followed to the police station by the defendant, Parrish and Miss Wall. Narcotics Officer C. T. Long examined the pills and ran a preliminary test on some of them and the test showed they contained the Controlled Substance, Amphetamine. Officer Long informed Officer Spillman that the defendant Crews had a reputation for selling pills. Officer Spillman drew an arrest warrant for the possession of a controlled substance, amphetamine. Based upon what the defendant Parrish had said to the defendant Crews in the bathroom; quote, "Hey, what about the others?", (Officer Spillman believed that there were still more amphetamine pills in the apartment.)

He then drafted an affidavit, as appears of record, to obtain a search warrant for the apartment of the defendants, and appeared before the Magistrate, where he was sworn and examined by the Magistrate, who then issued a search warrant for 1021 Sunset Drive, Apartment G, Winston-Salem, North Carolina.

Officer Spillman took the search warrant to the defendant Crews and read him the same and asked for a key and was told by Crews to get in the best way he could. Officer Spillman and Officer Long, with the search warrant, went to the apartment of the defendants, but they were preceded there by the defendant Parrish and Miss Wall, who had been at the police station at the time the search warrant was issued and read to the defendant Crews.

When the officers arrived at the apartment, they found the front door standing slightly open and they pushed it open and announced, "Police Officers, Search Warrant" and walked toward the bedroom, where they found the defendant Parrish sitting on the bed with a .22 caliber rifle laying beside her. The officers immediately took charge

of the weapon and found a live round jammed in the breech. Officer Spillman went to the closet and found the cardboard box, observed earlier sitting on the shelf beside the bottle of pills, was gone. He then went to the bed, where under the bed at the point where the defendant Parrish was sitting, he found the cardboard box that has been on the closet shelf. An examination of the contents of the box revealed it contained a plastic bag with several hundred pills similar to the ones in the brown-tinted plastic bottle. In addition, there were three or four more plastic bottles containing more pills. These items were seized by the officers and returned to the police station and all the items seized were taken to the Drug Laboratory.

Officer Spillman was not acquainted with the defendants, Crews and Parrish, and knew nothing of their reputation for dealing in drugs. While Officer Rogers knew the defendant Crews and his ex-wife, (he did not know the defendant Parrish) and nothing about the reputation of either for dealing in drugs. The officers went there to serve a capias, not to search for drugs at any time.

(The discovery of the drugs sitting on the closet shelf in plain view was purely accidental and inadvertent without any design on the part of the officers to search the premises for evidence of other crimes.)

(The defendants except to the Trial Court's failure to consider all the evidence in making its findings of fact, and to make findings one way or the other to material, necessary facts raised by the evidence on Voir Dire.)

Based upon the foregoing findings of fact, the Court concludes as a matter of law:

(1. The Instanter Capias was issued according to law.)

(2. The manner of execution of the same was reasonable.)

(3. The officers were legally within the confines of the defendant's bedroom, when the contraband was seen in "plain view" and they had

reasonable grounds to seize it and even arrest the defendants at that time for its possession even though they did not.)

(4. The search warrant, later issued, was based upon probable cause upon facts within the knowledge of the requesting officer and was a valid, legal search warrant.)

(5. The subsequent search with the warrant was conducted within limits of the law and the Constitutional Rights of the defendants.)

(6. None of the defendants' Four Amendment Rights against unreasonable search or seizure were violated before, during or after seizure.)

(7. The contraband seized on both occasions is admissible into evidence against each of the defendants.)

NOW, THEREFORE, the DEFENDANTS' MOTION to suppress the evidence seized in the case is denied.

s/WILLIAM Z. WOOD
Judge Presiding

Verdict, Judgment & Commitment by Trial Court:

VERDICT:

THE COURT: Ladies and gentlemen, have you reached a verdict in the case of State vs. Deborah Leigh Parrish and in the case of State vs. Jerry M. Crews?

JURY FOREMAN: Yes, sir.

THE COURT: Mr. Clerk, will you take these verdicts?

THE CLERK: As to the defendant, Jerry M. Crews, do you find the defendant guilty of possession of controlled substance, amphetamine, or do you find the defendant not guilty?

JURY FOREMAN: Guilty.

THE CLERK: Is this your verdict, so say you all?

JURY FOREMAN: Yes.

THE CLERK: As to the defendant, Deborah L. Parrish, do you find the defendant guilty of possession of controlled substance,amphetamine, or do you find the defendant not guilty?

JURY FOREMAN: Guilty.

THE CLERK: Is this your verdict, so say you all;

JURY: Yes. . . .

JUDGMENT:

THE COURT: (As to Mr. Crews, it is adjudged that the defendant be imprisoned for a term of four years in the State's prison. Then, at the completion of the four year term, it is adjudged that the defendant be imprisoned for a term of one year in the State's prison. Said sentence of one year is suspended for five years and the defendant is placed on probation for five years under the supervision of the North Carolina Probation Commission and its officers and subject to its rules and regulations on the following conditions: one, that he pay the costs of this action; two, that he waive his right against illegal search under the United States Federal - - United States Constitution and agrees that he can be searched at anytime by - - that he or his automobile or any other - - or any place where he lives or works can be searched at anytime by any law enforcement officer of the United States or the State of North Carolina or of the local law enforcement officer including the probation officer and that he further agree that any substance or anything found as a result of such search can be used against him in any court in the land; four, that he not have in his possession any drugs except those prescribed for him by a licensed physician; five, that he not violate any State or Federal Law; that he abide by the other conditions of a probationary judgment which I will ask the probation officer to hand up.

THE COURT: (It is adjudged that the defendant be imprisoned for a term of two years in the State Department of Correction in quarters provided for women prisoners.

Now, that is the active part of it. As to the other part, it is adjudged that the defendant be imprisoned for a term of two years in the State Department of Correction in quarters provided for women prisoners. The sentence of imprisonment is suspended for five years and the defendant is placed on probation for five years under the supervision of the North Carolina Probation Commission and its officers and subject to its rules and regulations on the following conditions: one, that the defendant report to the probation officer within forty-eight hours after she is released from the prison sentence; two, that she waives her rights against illegal search guaranteed her under the United States Constitution during the time of this probationary period and agrees to allow herself, her person, her automobile, her place of residence or place where she works to be searched and that she further - - by any law enforcement officer of the United States of the State or of the local law enforcement officer and that she further agrees that any substance or anything seized as a result of such search can be used against her in any court in the land; and, three, that she not violate any State or Federal law.

Now, in the other judgment as to the other defendant, I want to add that he is to report to the probation officer within forty-eight hours after he is released, in Forsyth County within forty-eight hours after he is released from the first part of this split sentence that I'm giving in these cases.

That she abide by the other conditions of probationary sentence. This sentence is to commence at the expiration of the sentence given of the two-year sentence, the active part of this sentence given and this is a split sentence given pursuant to GS ninety dash ninety-five.)

JUDGMENT AND COMMITMENT (CREWS):

In open court, the defendant appeared for trial upon the charge or

charges of possession of the controlled substance, amphetamines, and thereupon entered a plea of not guilty.

A jury having found the defendant guilty of the offense of the possession of the controlled substance, amphetamines, the grade of felony;

It is ADJUDGED that the defendant be imprisoned for the term of four (4) years in the State Dept. of Corrections.

It is ORDERED that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This the 13th day of Sept., 1973.

s/WILLIAM Z. WOOD
Judge Presiding

PROBATION JUDGMENT (CREWS):

1. This Cause coming on to be heard and being heard at the September 13, 1973 Session of Court in the aforesaid County before the undersigned Judge in the City of Winston-Salem, North Carolina and the above named defendant (was duly convicted) of the crime of possession of amphetamine.

2. NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the said defendant be and he is hereby, sentenced by this Court to Forsyth County jail, to be assigned to work under the supervision of the State Department of Correction of North Carolina for a period of one (1) year to take effect at a time and as further order by the Court.

IT APPEARING, HOWEVER, to satisfaction of the court that the character of said defendant and the circumstances of the case indicate that probation will probably result in the reformation of the defendant and that he is eligible for probation under the North Carolina Statutes.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Execution of the aforesaid sentence of 1 year be, and the same is hereby, suspended, and that the said defendant is hereby placed on probation for a period of 5 years under the supervision of the North Carolina Probation Commission and its officers, subject to the provisions of the laws of this State and the rules and orders of said commission and its officers with leave that the execution might be prayed at any time during the period of probation to take effect at a time and as further ordered by the Court.

3. That as a condition of probation the aforesaid defendant shall:

(a) Avoid injurious or vicious habits;

(b) Avoid persons or places of disreputable or harmful character;

(c) Report to the Probation Officer as directed;

(d) Permit the Probation Officer to visit at his home or elsewhere;

(e) Work faithfully at suitable, gainful employment as far as possible and save his earnings above his reasonably necessary expenses.

(f) Remain within a specified area and shall not change place of residence without written consent of the probation officer;

(g) Pay a fine in one or several sum as directed by the Court;

(h) Make reparation or restitution to the aggrieved party for damage or loss caused by his offense in an amount to be determined by the Court;

(i) Support his dependents;

(j) Waive extradition to the State of North Carolina from any jurisdiction in or outside the United States.

(k) Violate no penal law of any state or the Federal Government and be of general good behavior;

(l) Pay the costs;

(m) Pay into the office of the Clerk of Court the sum of $ to reimburse the State for his counsel's fees.

That he report to the Probation Officer within 48 hours after being released from his active prison sentence.

That he waive his right to any illegal or unreasonable search of his person, his place of residence, his automobile, or any automobile in which he is in or driving without a search warrant by the Probation Officer or any law enforcement officer of this State or any state or the Federal Government.

Any property seized during any such search may be used against him in any court in the United States.

That he not have in his possession any drugs except those prescribed by a licensed physician.

4. If the defendant violates any of the conditions of his probation or orders of his probation officer he will be subject to arrest upon order of the Court, or by the probation officer. At any time within the period of his probation, the Court may, if it sees fit, impose the Judgment and sentence it might have imposed in the first instance.

IT IS ORDERED, that the defendant follow the probation officer's instructions and advise.

IT IS FURTHER ORDERED, That any statement or report the defendant makes to his probation officer, either orally or in writing is to contain the truth. The defendant's failure to state the truth will constitute a violation of his probation.

This 13th day of September, 1973.

Judge presiding

I have had the above read and explained to me, and I understand its meaning and agree thereto.

This the 13th day of September, 1973.

(signed) Probationer	(Witness) Probation Officer
1021 Sunset Drive, Apt. G Winston Salem, N.C. Address	P. O. Box 48 Winston-Salem, N.C. Address

JUDGMENT AND COMMITMENT (PARRISH)

In open court, the defendant appeared for trial upon the charge or charges of the possession of the controlled substance, amphetamines and thereupon entered a plea of not guilty.

The Jury having found the defendant guilty of the offense of the possession of the controlled substance amphetamines, the grade of felony;

It is ADJUDGED that the defendant be imprisoned for the term of two (2) years in the custody of the Commissioner of Corrections

in quarters provided for women prisoners. This defendant is to be given a complete physical and mental examination and whatever treatment these examinations indicate she needs.

It is ORDERED that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cuase the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Corrections.

This 13th day of Sept., 1973.

s/WILLIAM Z. WOOD
Judge Presiding

PROBATION JUDGMENT (FEMALE) (PARRISH):

1. THIS CAUSE Coming on to be heard and being heard at the SEPTEMBER 13, 1973 Term of Court in the aforesaid County before the undersigned Judge in the City of WINSTON-SALEM, North Carolina, and the above named defendant entered a plea of guilty to the crime of POSSESSION OF AMPHETAMINE.

2. NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED, That the said defendant be and she is hereby, sentenced by this Court to suitable quarters for women prisoners provided by, and under the supervision of the State Department of Correction of North Carolina for a period of TWO (2) YEARS to take effect at a time and as further ordered by the Court.

IT APPEARING, HOWEVER, to satisfaction of the Court that the character of said defendant and the circumstances of the case indicate that probation will probably result in the reformation of the defendant and that she is eligible for probation under the North Carolina Statutes.

IT IS FURTHER ORDERED, ADJUDGED and DECREED That the Execution of the aforesaid sentence of 2 YEARS be, and the same is hereby suspended, and that the said defendant is hereby placed on probation for a period of 5 years under the supervision of the North Carolina Probation Commission and its officers, subject to the provisions of the laws of this State and the rules and orders of said Commission and its officers with leave that the execution might be prayed at any time during the period of probation to take effect at a time and as further ordered by the Court.

3. That as a condition of probation the aforesaid defendant shall:

(a) Avoid injurious or vicious habits;

(b) Avoid persons or places of disreputable or harmful character;

(c) Report to the Probation Officer as directed;

(d) Permit the Probation Officer to visit her home or elsewhere;

(e) Work faithfully at suitable, gainful employment as far as possible and save her earnings above her reasonably necessary expenses;

(f) Remain within a specified area and shall not change place of residence without written consent of the probation officer;

(g) Pay a fine in one or several sum as directed by the Court;

(h) Make reparation or restitution to the aggrieved party for damage or loss caused by her offense in an amount to be determined by the Court;

(i) Support her dependents;

(j) Waive extradition to the State of North Carolina from any jurisdiction in or outside the United States:

(k) Violate no penal law of any state or the Federal Government and be of general good behavior;

(l) Pay the costs.

(m) Pay into the office of the Clerk of Court the sum of $ to reimburse the State for her counsel's fee.

SPECIAL CONDITIONS:

JUDGMENT TO RUN AT THE EXPIRATION OF TWO YEARS ACTIVE SENTENCE REPORT TO THE PROBATION OFFICER WITHIN 48 HOURS AFTER HER RELEASE OPEN SEARCH.

(4) If the defendant violates any of the conditions of her probation or orders of her probation officer she will be subject to arrest upon order of the Court, or by the probation officer. At any time within the period of her probation, the Court may, if it sees fit, impose the Judgment and sentence it might have imposed in the first instance.

IT IS ORDERED That the defendant follow the probation officer's instructions and advice.

IT IS FURTHER ORDERED That any statement or report the defendant makes to her probation officer, either orally or in writing is to contain the truth. The defendant's failure to state the truth will constitute a violation of her probation.

This 13 day of September, 1973.

s/WILLIAM Z. WOOD
Judge Presiding

I have had the above read and explained to me and I understand its meaning and agree thereto.

This the 13 day of September, 1973.

(Signed)
Probationer

(Witness)
Probation Officer

APPENDIX D

NORTH CAROLINA 1973 SESSION LAWS
(Chapter 540)

. . .

Sec. 5. Subsection (a) of G. S. 90-91 is hereby repealed and subsections (b) through (i) of G. S. 90-91 are hereby redesignated as (a) through (h), respectively.

Sec. 6. Subsection (c) of G. S. 90-90 is hereby rewritten to read as follows:

"(c) Any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Amphetamine, its sales, optical isomers, and salts of its optical isomers.

2. Phenmetrazine and its salts.

3. Methamphetamine, including its salts, isomers and salts of isomers.

4. Methylphenidate."

Sec. 8. This act shall become effective upon ratification. . . .

In the General Assembly read three times and ratified, this the 17th day of May, 1973.

APPENDIX E

1971 Cumulative Supplement to
North Carolina General Statutes 90-91(a)
and 90-95(d)

§ 90-91. SCHEDULE III CONTROLLED SUBSTANCES. . . .

(a) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Amphetamine, its salts, optical isomers, and salts of its optical isomers. . . .

§ 90-95. VIOLATIONS, PENALTIES:

(a) Except as authorized by this Article, it shall be unlawful for any person: . . .

(3) To possess a controlled substance included in any schedule of this article. . . .

(c) Any person who violates G. S. 90-95 (a) 3) with respect to controlled substances included in Schedules I or II of this Article shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000) or both in the discretion of the court.

. . .

(d) Any person who violates G. S. 90-95 (a) (3) with respect to controlled substances included in Schedules III and IV of this Article shall, for the first offense, be guilty of a misdeameanor. . .

APPENDIX F

1973 CUMULATIVE SUPPLEMENT

TO NORTH CAROLINA GENERAL STATUES

90-90(c) and 90-95.

90-90. SCHEDULE II CONTROLLED SUBSTANCES.

. . .

(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Amphetamine, its salts, optical isomers, and salts of its optical isomers.

. . .

APPENDIX G

1973 CUMULATIVE SUPPLEMENT

NORTH CAROLINA GENERAL

STATUTE 90-88.

90-88. Authority to control. –(a) The North Carolina Commission for Health Services shall administer those portions of this Article having to do with the scheduling of controlled substances under this Article, and may add, delete, or reschedule substances within Schedules I through VI of this Article. On the petition of any interested party, or on its own motion, the North Carolina Commission for Health Services may add, delete, or reschedule a substance as a controlled substance within Schedules I through VI of this Article. In every case the North Carolina Commission for Health Services shall give notice of and hold a public hearing prior to adding, deleting or rescheduling a controlled substance within Schedules I through VI of this Article. A petition by the North Carolina Drug Authority, the North Carolina Department of Justice, or the North Carolina Board of Pharmacy to add, delete, or reschedule a controlled substance within Schedules I through VI of this Article shall be placed on the agenda, for consideration, at the next regularly scheduled meeting of the North Carolina Commission for Health Services, as a matter of right. Notice as required by this section shall consist of notice by one publication in three newspapers of statewide circulation qualified for legal advertising in accordance with G.S. 1-597 and 1-598. In addition, the North Carolina Department of Human Resources shall mail a notice of the proposed change and the date and place of the public hearing to each registrant under this Article. In making a determination regarding a substance, the North Carolina Commission for Health Services shall consider the following:

(1) The actual or relative potential for abuse;

(2) The scientific evidence of its pharmacological effect, if known;

(3) The state of current scientific knowledge regarding the substance;

(4) The history and current pattern of abuse;

(5) The scope, duration, and significance of abuse;

(6) The risk to the public health;

(7) The potential of the substance to produce psychic or physiological dependence liability; and

(8) Whether the substance is an immediate precursor of a substance already controlled under this Article.

(b) After considering the required factors, the North Carolina Commission for Health Services shall make findings with respect thereto and shall issue an order adding, deleting or rescheduling the substance within Schedules I through VI of this Article.

(c) If the North Carolina Commission for Health Services designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor.

(d) If any substance is designated, rescheduled or deleted as a controlled substance under federal law, the North Carolina Commission for Health Services shall similarly control, or cease control of, the substance under this Article after the expiration of 180 days from publication in the Federal Register of a final order designating a substance as a controlled substance unless, within the 180-day period, the North Carolina Commission for Health Services objects to such inclusion. In such case, the North Carolina Commission for Health Services shall cause to be published and made public the reason for such objection and shall afford all interested parties an opportunity to be heard. At the conclusion of such meeting, the North Carolina Commission for Health Services shall make public its decision, which

shall be final unless specifically acted upon by the North Carolina General Assembly. Upon publication of objection to inclusion under this Article by the North Carolina Commission for Health Services, control under this section shall automatically be stayed until such time as the North Carolina Commission for Health Services makes public its decision.

(e) The North Carolina Commission for Health Services shall exclude any non-narcotic substance from the provisions of this Article if such substance may, under the federal Food, Drug and Cosmetic Act, lawfully be sold over-the-counter without prescription.

(f) Authority to control under this Article does not include distilled spirits, wine, malt beverages, or tobacco.

(g) The North Carolina Commission for Health Services shall similarly exempt from the provisions of this Article any chemical agents and diagnostic reagents not intended for administration to humans or other animals, containing controlled substances which either (i) Contain additional adulterant or denaturing agents so that the resulting mixture has no significant abuse potential, or (ii) Are packaged in such a form or concentration that the particular form as packaged has no significant abuse potential, where such substance was exempted by the Federal Bureau of Narcotics and Dangerous Drugs. (1971, c.919, s. 1; 1973, c. 476, s. 128; cc. 524, 541.)

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In The

Supreme Court of the United States

October Term, 1974

No.

JERRY MILTON CREWS
and
DEBORAH LEIGH PARRISH,
Petitioners

v.

STATE OF NORTH CAROLINA
and
RUFUS L. EDMISTEN
Attorney General of the
State of North Carolina
Respondents

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA and RUFUS L. EDMISTEN Attorney General of the State of North Carolina IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Carolina is reported in 286 NC 41, 209 SE 2d 462 (1974). The opinion of the North Carolina Court of Appeals is reported in 22 NC App. 171, 205 SE 2d 765 (1974). The opinion of the North Carolina Supreme Court is attached to petitioners' brief as Appendix A. The opinion of the North Carolina Court of Appeals is attached to petitioners brief as Appendix B.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

I. WHETHER THE ACTION OF THE NORTH CAROLINA SUPREME COURT IN UPHOLDING A SEIZURE OF A CERTAIN BOTTLE OF PILLS, WHICH THE OFFICER SAW AND SEIZED WHILE IN THE PROCESS OF ARRESTING THE DEFENDANT, CREWS, IN HIS RESIDENCE ON AN UNRELATED MATTER, WHEN THE SAID POLICE OFFICER HAD NO KNOWLEDGE OR INFORMATION THAT THE PILLS SEIZED WERE CONTRABAND, VIOLATED THE DEFENDANTS' RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THEREBY INVALIDATING THE SUBSEQUENT SEARCH WARRANT AND SEIZURES?

II. WHETHER OR NOT THE ACTION OF THE NORTH CAROLINA SUPREME COURT IN REFUSING TO PASS UPON THE QUESTION OF AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY BY THE NORTH CAROLINA GENERAL ASSEMBLY TO THE STATE BOARD OF HEALTH, UNDER WHICH THE STATE BOARD OF HEALTH WAS PERMITTED TO CHANGE THE CLASSIFICATION AND PUNISHMENT OF A CRIME FROM A MISDEMEANOR TO A FELONY, LEAVES STANDING A GRIEVIOUS INJURY TO THE CONSTITUTIONAL RIGHTS OF THE DEFENDANTS IN VIOLATION OF THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT IV.

> "The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Constitution of the United States, Amendment XIV, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On May 16, 1973, Officers Spillman and Rogers, of the Winston-Salem, North Carolina Police Department, went to petitioner Crews' residence, located at 1021 Sunset Drive. They arrived at approximately 4:00 a.m. and their purpose was to serve an order for arrest on Crews for failure to appear in domestic relations court. Beverly Lee Wall, who was a guest in the apartment, and a witness, but not a defendant, answered the door, and in answer to the question if the defendant Mr. Crews were present, stated "He's in there," or words to that effect and pointed towards the bedroom. The two police officers proceeded to the bedroom which had been pointed out to them by Miss Wall, using their flashlights in going down the hallway, because there were no lights on in the building at the time.

Upon arrival in the bedroom, Officer Rogers turned on the overhead light. Defendants Parrish and Crews were in bed together. Mr. Crews was informed that he would be required

to accompany the officers to the police station since they had an order for his arrest.

Mr. Crews, who was nude at the time, got out of bed and put on a pair of shorts which had been on the floor beside the bed. He then proceeded towards the closet and, as he went in the closet, turned on the light. Officer Spillman, who had followed him, observed a clear brown-tinted pint-size, plastic bottle with no label on it, containing several hundred multi-colored pills, on the closet shelf near a pasteboard box. As the officer picked up the bottle, Crews said, "Hey, wait a minute those are not mine." Both officers thought the pills were contraband, and were amphetamines or barbituates, and both officers had had some previous training in drug identification.

Mr. Crews then left the closet and walked down the hallway toward the bathroom. Defendant Parrish followed him in the bathroom and while the two were there, Officer Spillman, who was outside in the hallway, heard the defendant Parrish say to the defendant Crews, "Hey, what about the others."

The two officers took defendant Crews and the pills to the police station and made a request that a narcotics agent examine and test the pills. A preliminary test of some of the pills determined that those tested were amphetamines. An arrest warrant was then prepared for possession of amphetamines and a search warrant was obtained for the apartment based upon an affidavit which indicated that the officers believed there were other amphetamines in the apartment.

When the officers returned to the apartment with the search warrant they discovered the pasteboard box on the closet shelf was missing. They then looked under the bed, where defendant Parrish was lying with a .22 automatic rifle "jammed" with a live cartridge lying beside her, and discovered the box containing several thousand pills. The pills were similar to the ones that had been found earlier in the clear, brown-tinted bottle. The defendant Parrish was then arrested.

The defendants were tried and convicted of possession of a Schedule II substance—amphetamines, in violation of N.C.G.S. 90-95. Violation of a Schedule II substance is a felony.

North Carolina General Statutes, which are controlling in deciding this case, are appended to Petitioners' brief as Appendixes D, E, F and G.

ARGUMENT

I

WHEN POLICE OFFICERS ARE LAWFULLY ON THE PREMISES, THE SEIZURE OF CONTRABAND, SUCH CONTRABAND BEING DISCOVERED INADVERTENTLY AND BEING IN PLAIN VIEW OF THE OFFICERS, DOES NOT VIOLATE PETITIONER'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In North Carolina when a defendant objects to the admissibility of evidence for the State on the grounds that it was obtained by an unlawful search, the trial court, in the absence of the jury, is required to hear the evidence of the State and of the defendant concerning the lawfulness of the search and seizure and to make findings based upon that evidence. *State v. Eppley*, 282 NC 249, 192 SE 2d 441 (1972); *State v. Pike*, 273 NC 102, 159 SE 2d 334 (1968).

Both the State and the defendants were afforded ample opportunity on voir dire to establish the facts as they believed them to be. The record of the examination on voir dire was extensive, penetrating and covered more than eighty-five (85) pages in the record of trial. After the voir dire examination the trial judge made extensive findings of fact which are attached to petitioners' brief as Appendix C. In his findings of fact the judge over-ruled defendants' objections to the introduction of the pills into evidence; found that the officers were legally on the premises; that the clear bottle was found in plain view; and that no search warrant was required for its seiziure. In North

Carolina when findings are made by the trial judge, on voir dire, are supported by competent evidence, and not violative of any laws, they are conclusive on appellant courts. *State v. Lock*, 284 NC 182, 200 SE 2d 49 (1973); *State v. Johnson*, 280 NC 295, 185 SE 2d 689 (1971). (CF. Rule 52, Federal Rules of Civil Procedure).

The interpretation of State laws by the highest court of a State should be accepted by a Federal Court unless that interpretation conflicts with the United States Constitution. *Wright v. Rhay*, 323 F. 2d 653 (9th Cir. 1963), and a construction of a State statute by the highest court of a State binds a Federal Court. *Huddleston v. Dwyer*, 322 US 232, 88 LEd 1246 (1944); *Albertson v. Milland*, 345 US 242, 97 LEd 983 (1953). Therefore, the interpretation of the North Carolina voir dire hearings should be binding on Federal Courts.

Petitioners' contention that officers, even though they are legally on the premises, can under no circumstances seize property even though they believe such property to be contraband, unless and until they are absolutely sure and have been absolutely shown that it is contraband, is unreasonable and unrealistic. It is impossible for an officer to look at marijuana, pills, alcohol, or any other like product, and determine its chemical composition. The composition of many products cannot be determined until an analysis of those products has been made. Therefore, it was perfectly permissible for the officers, acting on a reasonable belief that the pills they saw, inadvertently and in plain view, were either barbituates or amphetamines, to seize such pills. The seized pills, having been examined and determined to be amphetamines, when coupled with the statement of petitioner Parrish, "What about the others", was sufficient probable cause to issue a search warrant to return to the apartment to search for other pills. Therefore, no error was committed in the introduction of the pills into evidence, including those found in the clear plastic bottle and those discovered in the cardboard box.

In *State v. Harvey*, 281 NC 1, 187 SE 2d 706, a case similar

to this case, defendant was charged in a bill of indictment with unlawful possession of marijuana. The evidence showed that the police officer went to the home of the defendant for the purpose of serving an arrest warrant. Upon arrival, he observed the defendant looking out the door of a utility room. The officer approached the door and twice called the defendant's name. When he received no reply, he opened the utility door a few inches and again called defendant's name. The defendant then answered and the deputy sheriff observed him standing a few feet away. After reading the warrant to the defendant, the officer observed what he thought were marijuana seeds lying on top of a deep freezer a few feet away. After arresting defendant, he went into the utility room and gathered up the marijuana seeds with his hands. He then picked up a plastic jar located near the deep freezer to pour the seeds into the jar, and as he did so, he observed more marijuana seeds and some vegetable matter in the jar. The Court, at page 12, observed,

> "Obviously, the seizure of the marijuana seed came squarely within the 'plain view' doctrine set out in *State v. Virgin*, supra. [276 NC 217, 172 SE 2d 28]. Nor do we think there was a general exploratory search or unreasonable search when the officer saw marijuana inside a plastic jar which he had picked up to use as a container for the seized marijuana seed. Officer Respass was legally on the premises, and no search was required to discover the contraband material. There was sufficient evidence to support the trial judge's findings, and the findings in turn support his conclusions of law and ruling."

In *U.S. v. Bradshaw*, 490 F. 2d 1097 (4th Cir. 1974) the Court held that, in order to justify a search and seizure under the "plain view doctrine", an officer's presence at a vantage point from which he discovers evidence in plain view must not amount to an unjustifiable intrusion into any areas in which the defendant's expectation of privacy by the Fourth Amendment would be violated and the discovery of evidence in plain view must have been inadvertent.

In *People v. McEwen*, 244 Cal App. 2d 534, 53 Cal Rep. 232, the Court held that when officers in the course of making a proper search, come upon any contraband, its seizure is entirely proper.

In *Harris v. U.S.*, 331 US 145, 91 LEd 1399, 67 S Ct. 1098, this Court held that if an officer enters upon premises in an authorized manner and the search that follows is valid, there is nothing in the Fourth Amendment which prohibits law enforcement officers from seizing government property, the possession of which is a crime.

The petitioners, in their Petition for Writ of Certiorari, cite a number of cases to support their contentions. However, a close look at those cases shows that many of them do not support petitioners' contentions, can be distinguished upon the facts, or had accompanying strong dissenting opinions.

The Tennessee Supreme Court, in *Armour v. Totty*, 486 SW 2d 537 (Tenn. 1972), affirmed the order of the Commissioner of the Department of Safety in seizing an automobile for transporting contraband. The evidence indicated that appellee's automobile was legally stopped by a police officer for an illegally attached license tag. The officer, upon stopping the car, observed a white plastic bag, partially opened underneath the driver's seat with a greenish substance in it. He had previously seen marijuana and knew what it looked like. Upon seeing the plastic bag, he opened the door, seized the substance and placed the appellee under arrest. The Court held that the officer had a legal right to seize the plastic bag containing the substance which appeared to be marijuana. The "green stuff" looked like marijuana which the officer had seen before and "some green stuff" was visible to the officer. The "green stuff" was in "plain view", the officer had a right to be in a position to see it, the substance was discovered inadvertently and the incriminating nature of the object was apparent from the "plain view" of the object. At page 537, the Court observed:

"The Fourth Amendment seeks to protect that which an

individual seeks to 'preserve as private', *Katz v. U.S.*, 389 US 347, 88 S. Ct. 507, 19 L.Ed. 2d 576 (1967). An individual does not seek to 'preserve as private' that which falls in 'plain view' of an officer who has the right to be there. Visual detection of this nature does not constitute a search within the meaning of the Fourth Amendment." [Citations omitted].

The Supreme Court of Alabama, in *Shipman v. State*, 291 Ala. 484, 282 So. 2d 700 (1973), held that a seizure of a bag containing a white substance from an occupant of an automobile, which car had been legally stopped, could not be sustained under the "plain view" doctrine. The incriminating nature of the evidence was not evident and was not apparent to the officer. There was no testimony at the trial of this case to indicate that the white powder was any different from any other white powder. The Court stated that the officer must have reasonable grounds that the evidence seized is contraband and the reasonable grounds must be evident from the nature of the substance. There was, however, a strong dissent in this case by four justices. The dissenting opinion, even in this case, would hold that probable cause existed and that the warrantless seizure of the contraband came within the "plain view" exception and its introduction into evidence did not violate defendant's Fourth Amendment rights.

In *State v. Matthews*, 216 NW 2d 90 (S.D. 1974), the Court held that the "plain view" doctrine does not apply to packages which are sealed and packages which do not reveal by appearance that they contain any contraband.

In *State v. Meichel*, 290 So. 2d 878 (La 1974), the Supreme Court of Louisiana held that the seizure of a pill bottle from the front seat of an automobile did not fall within the "plain view" doctrine where the officer did not know the nature of the pills until he had picked up the bottle and examined it. The officer did not have a right to pick up the object in his view to determine if it is or would be evidence in a criminal trial. An

object may, however, be seized where it is readily apparent that the object is contraband or evidence. Even in this case there was a strong dissent by the Chief Justice and he was joined by two other justices.

In *Nicholas v. State*, 502 SW 2d 169 (C.C.A. Tex. 1973), officers who were legally in defendant's home, observed some film negatives which they picked up and held to the light to see. The Court in excluding this evidence stated that it was not apparent to the officers until their examination by holding such negatives up to the light that such evidence was illegal.

In *Armour v. Totty*, supra., the facts are similar to those here. The officers there were familiar with marijuana and could see the "green stuff" without having to first examine the container. In *Shipman v. State*, supra., the officers could not show that the "white powder" seized was any different than any other white powder which is not contraband. In *State v. Matthews*, supra., the container was sealed and an exterior examination did not reveal that it contained any contraband. In *State v. Meichel*, supra., the nature of the pill bottle could not be determined until the officers had actually picked the bottle up and examined it.

Here, the officer did not pick up the bottle to examine it to determine if the pills were contraband. The officer stated that he was familiar with amphetamines and barbituates; that he could see through the clear, plastic jar; that he had had previous training in amphetamines and barbituates, and that the bottle had no label on it and he thought that the pills in the clear plastic bottle were either amphetamines or barbituates. He made this determination without having to pick up the bottle and examine it.

The Respondents earnestly contend that no Fourth or Fourteenth Amendments rights of Petitioners were violated when the Court ruled that the amphetamines were admissible into evidence.

II

THE NORTH CAROLINA SUPREME COURT WAS CORRECT WHEN IT HELD THAT IT WOULD NOT IN THIS CASE CONSIDER THE CONSTITUTIONALITY OF A STATE STATUTE, WHERE THE ISSUES HAD NOT BEEN PRESENTED AND ADJUDICATED IN THE COURTS BELOW.

On 16 May 1973, the date of the offense, amphetamines were listed as a Schedule III controlled substance in G.S. §90-91 (a) (1971 Cumulative Supplement). On that date, possession of any amount of a Schedule I or II substance was a felony. G.S. §90-95 (c). Possession of a Schedule III substance was a misdemeanor. G.S. §90-95 (d). By order dated 23 March, 1972, effective 24 April, 1972, the State Board of Health (now Commission for Health Services), acting within its delegated authority pursuant to G.S. §90-88 (1971 Cumulative Supplement) reclassified amphetamines from a Class III substance to a Class II substance. Under the law at that time [G.S. §90-95 (c)] possession of any amount of a Schedule II substance was a felony. The defendants contend that the reclassification by the State Board of Health of amphetamines from a Class III substance to a Class II substance is unconstitutional.

The questions here raised concerning the constitutionality of the delegation of authority by the General Assembly of North Carolina to the North Carolina State Board of Health is not properly before this Court, because this question was not raised in the trial court and was not raised in the North Carolina Court of Appeals. It was raised for the first time when the petitioners appealed their cases to the North Carolina Supreme Court from an adverse decision in the North Carolina Court of Appeals.

As this Court stated in *Williams v. Georgia*, 349 US 375, 382, 99 L. Ed. 1161, 1170 (1954), "A State procedural rule which forbids the raising of Federal questions at late stages in the case, or by any other than a prescribed method, has been

recognized as a valid exercise of State power." See also *Chambers v. Mississippi*, 410 US 284, at 308 et seq. 35 L. Ed 2d 297, (1973) [Opinion of Rinquist, J.].

The North Carolina Appellant Rule of Practice is to the effect that the "Supreme Court will not decide questions which have not been presented or adjudicated in the Court below, especially questions relating to the constitutionality of a statute or an Act of Congress". 1 *Strongs* NC Index 2d, p. 106 (1967), and cases cited therein. As Justice Moore wrote so clearly in *State v. Crews*, 286 NC 41, 209 SE 2d 462, 469:

> "Counsel for defendants in his brief admits that the contention regarding whether the acts of defendants constitute a misdemeanor or a felony was not raised in the Superior Court or in the Court of Appeals. This Court will not decide questions which have not been presented or adjudicated in Courts below especially questions relating to the constitutionality of a statute. As we said in *State v. Jones*, 242 NC 563, 89 SE 2d 129 (1955); '[I]n conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the Court below. [citation omitted]' Accord, *State v. Cumber*, 280 NC 127, 185 SE 2d 141 (1971); *State v. Dorsett* and *State v. Yow*, 272 NC 227, 158 SE 2d 15 (1967). Since the question of the constitutionality of G.S. 90-88 was not before the Superior Court or the Court of Appeals, it is not properly before us."

The defendants-appellants are asking this Court to declare a North Carolina statute unconstitutional without having first exhausted the remedies made available to them in the North Carolina Courts. In *Fay v. Noia*, 372 US 391, 9 LEd 2d 837, 87 S Ct. 822 (1963) this Court held that an applicant should not deliberately bypass the orderly procedures of State Courts and take his case to Federal Courts to seek Federal remedies when State remedies are available.

In *Townsend v. Saine*, 372 US 293, 9 LEd 2d 770, 83 S Ct. 745, this Court held that a hearing in a habeas corpus proceeding could be held in a Federal Court if, for any reason not attributable to the inexcusable neglect of the petitioner, evidence crucial to the adequate consideration of his constitutional claim was not developed at the State hearing. However, all these proceedings should be open hearings in order to allow the State to present adequate evidence.

In *U.S. v. Atkinson*, 297 US 157, 56 S Ct. 391, 80 L Ed. 555, this Court held that ordinarily constitutional issues should be raised and decided at the trial level and appellant courts would generally not entertain such issues except in exceptional cases where the public interest dictated, the errors were obvious, or the errors would otherwise seriously affect the fairness, integrity, or reputation of the judicial proceedings.

North Carolina has an extensive post conviction scheme providing for collateral review of convictions. G.S. 15-217 provides that persons in North Carolina prison facilities, if they feel they have been unduly convicted, may bring an action known as "Post Conviction Proceeding" to have their trial and sentence reviewed in the North Carolina Courts.

Without taking advantage of Post Conviction Proceedings and without having the issue raised at the trial level or the first appellant level the petitioners are asking this Court to declare a North Carolina statute unconstitutional without having presented any evidence at the trial level or before this Court that such statute should be so declared.

In *Miller v. State*, 237 NC 29, 74 SE 2d 513 (1953), the Supreme Court of North Carolina stated that the purpose of the "North Carolina Post Conviction Hearing Act" was to allow the Superior Court to probe beneath the adjudication in the original action in which an imprisoned petitioner was convicted and sentenced, and grant him appropriate relief concerning his conviction and sentence in the event it determined that two specified conditions concur. These conditions are: (1)

There was a substantial denial of the constitutional rights of the petitioner in the original criminal action in which he was convicted; and (2) There has been no prior adjudication as to such constitutional rights by any court of competent jurisdiction. The statute was designed to afford prisoners an adequate and available post-trial remedy under judicial decrees for unconstitutional deprivation of their rights in the original criminal action because they were prevented from claiming such constitutional rights in the original criminal action by factors beyond their control.

The State earnestly contends that the petitioners did not raise the constitutional question at the trial level and at the first stage of appellate review. Neither have they taken advantage of the North Carolina Post Conviction Procedures or Federal Habeas Corpus Procedures. They should therefore be denied relief in this Court. If they feel they have been unconstitutionally deprived of some right guaranteed by the Constitution, they should pursue such action under the North Carolina Post Conviction Hearing Procedures or in Federal Habeas Corpus Procedures. In such proceedings Respondents would be allowed a hearing to present their contentions and arguments concerning this question. To do otherwise would be deciding at this stage the constitutionality of a North Carolina Statute where proper evidence has not been presented concerning this statute in any court of law.

In *Fay v. Noia,* supra., this Court held an individual may not be denied his right to a habeas corpus proceeding merely because he may have an adequate State remedy. The petitioners therefore have two remedies available to them: one in the North Carolina Courts and one in the Federal Courts.

CONCLUSION

It is respectfully submitted that this Court should not grant certiorari in this case. The North Carolina Supreme Court was correct when it held that the pills seized were contraband, that they were in "plain view" of the officers who were legally on

the premises, that the pills were inadvertently discovered by them, and that the officers had reasonable grounds to believe the pills to be contraband when they first saw them.

It is further submitted that the North Carolina Supreme Court was correct when it refused to pass upon the constitutionality of a State statute when the question had not been presented or adjudicated in the Courts below.

It is therefore respectfully submitted that this Petition for Writ of Certiorari to the Supreme Court of North Carolina should be denied.

RUFUS L. EDMISTEN
Attorney General

JOHN R. B. MATTHIS
Assistant Attorney General
P.O. Box 629
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA and RUFUS L. EDMISTEN, Attorney General of the State of North Carolina, IN ANSWER TO PETITION FOR WRIT OF CERTIORARI on petitioners by depositing the same in the United States Mail to

Leslie G. Frye, of Counsel
Roberts, Frye & Booth
203 Northwestern Bank Building
Winston-Salem, North Carolina 27101

Harrell Powell, Jr. of Counsel
Powell, Keiger, Ijames & Parrish
400 NCNB Plaza
Winston-Salem, North Carolina 27101.

This the 5th day of May, 1975.

John R. B. Matthis
Assistant Attorney General

APPENDIX A

ORDER

NORTH CAROLINA STATE BOARD OF HEALTH NORTH CAROLINA CONTROLLED SUBSTANCES ACT — AMENDMENT TO REGULATIONS

The State Board of Health meeting at Raleigh, North Carolina, on March 23, 1972, in conformity with G.S. 90-98 after considering the following:

(1) the actual or relative potential for abuse; (2) the scientific evidence of its pharmacological effect; (3) the state of current scientific knowledge regarding the substance; (4) the history and current pattern of abuse; (5)

the scope, duration, and significance of abuse; (6) the risk to the public health; (7) the potential of the substance to produce psychic or physiological dependence liability; and (8) whether the substance is an immediate precursor of a substance already controlled under this Article.

Found that:

(1) Amphetamine; its salts, optical isomers, and salts of its optical isomers;
(2) Phenmetrazine and its salts;
(3) Any substance except injectionable liquid which contains any quantity of methamphetamine, including its salts, isomers and salts of isomers; and
(4) Methylphenidate.

which are in Schedule III, G.S. 90-91, and should be placed in Schedule II, G.S. 90-90, in conformity with G.S. 90-88 (a) because the State Board of Health found a high potential for abuse; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and the abuse of the substances may lead to severe psychic or physical dependence; and, therefore, § 1.12 (d) of the State Board of Health Rules and Regulations, effective April 24, 1972, on motion of Mr. Randleman, duly seconded by Dr. Coonrad and approved by a majority vote is hereby deleted and replaced with a new paragraph to read:

(d) Stimulants. Unless specifically excepted or unless listed in another schedule any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

1. Amphetamine, its salts, optical isomers, and salts of its optical isomers	1,100
2. Methamphetamine, its salts, isomers, and salts of its isomers	1,105
3. Phenmetrazine and its salts	1,630
4. Methylphenidate	1,726

Section 1.13 (b) of the State Board of Health Rules and Regulations effective March 23, 1972, on motion of Dr. Meredith, duly seconded by Mr. Randleman and approved by a majority vote is hereby amended to read:

(b) Stimulants. Unless specifically excepted or unless listed in another schedule any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Those compounds, mixtures, or preparations in dosage unit form containing any stimulant substances which are currently listed as excepted compounds under Section 2.32 and any other drug of the quantitative composition shown in that list for those drugs or which is the same except that it contains a lesser quantity of controlled substances.

CERTIFIED A TRUE AND EXACT COPY:

JACOB KOOMEN, M.D., M.P.H.
SECRETARY AND STATE HEALTH DIRECTOR
STATE BOARD OF HEALTH
RALEIGH, NORTH CAROLINA

APPENDIX B

§ 15-217. Institution of proceeding; effect on other remedies. — Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work under the supervision of the State Department of Correction, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina or both, or that the court was without jurisdiction to impose the sentence,

or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this article.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but, except as otherwise provided in this article it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof.